Supreme Court, U.S.
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No.

In the Supreme Court of the United States

HCA HEALTH SERVICES OF OKLAHOMA, INC., d/b/a OU MEDICAL CENTER d/b/a CHILDREN'S HOSPITAL, and OU MEDICAL CENTER,

Petitioners,

v.

NATHAN SHINN, a minor, by and through his parents, BRITTANY SHINN and BRANDON SHINN, and BRITTANY SHINN and BRANDON SHINN,

Respondents.

On Petition for a Writ of Certiorari to The Oklahoma Court of Civil Appeals

PETITION FOR A WRIT OF CERTIORARI

CLYDE A. MUCHMORE
Crowe & Dunlevy
20 N. Broadway
Oklahoma City, OK 73102
(405) 235-7734

STEVEN J. RODOLF
LESLIE C. WEEKS
Rodolf & Todd
401 S. Boston Avenue
Tulsa, OK 74103
(918) 295-2100

EVAN M. TAGER
Counsel of Record
DAN HIMMELFARB
BRIAN D. NETTER
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

On the day trial was scheduled to begin in a case in which her reelection campaign chairman was lead counsel for the plaintiffs, the trial judge directed a judgment of liability against the defendants as a sanction for alleged violations of discovery orders. The motion for sanctions had been filed that very morning, and the judge had refused to give the defendants more than an hour between the time they received the motion and the time of the hearing on the motion. She also refused to permit the defendants an opportunity to file a written response to the motion, much less to introduce evidence in opposition. After the trial judge instructed the jury to consider the fact that the defendants had committed "perjury" and engaged in "disobedience of a direct Court order," the jury returned an $18 million verdict, $9 million of which were punitive damages. The Oklahoma appellate courts found nothing wrong with the procedures resulting in this extraordinary award. The questions presented are:

1. Whether the Due Process Clause of the Fourteenth Amendment requires recusal of a judge in a case in which the chair of her ongoing reelection campaign is lead counsel for one of the parties.

2. Whether the Due Process Clause of the Fourteenth Amendment requires courts to provide parties with particularized notice and an opportunity to present evidence and to submit a written response before imposing a severe sanction such as dismissal or direction of a judgment on liability.

RULE 29.6 STATEMENT

HCA Health Services of Oklahoma, Inc., d/b/a OU Medical Center, is wholly owned by Hospital Corp., LLC, which is wholly owned by Healthtrust, Inc.-The Hospital Company, which is wholly owned by HCA Inc. Hercules Holding II, LLC ("Hercules") is the parent company of HCA Inc., currently owning approximately 97.5% of its common stock. Some members of Hercules are affiliated with Merrill Lynch & Co., Inc., which is a publicly traded company.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i
RULE 29.6 STATEMENT ii
TABLE OF AUTHORITIES v
OPINIONS BELOW 1
JURISDICTION 1
CONSTITUTIONAL PROVISION INVOLVED 1
STATEMENT 2
A. Background 4
B. Pretrial Proceedings 5
C. Sanctions 7
D. Appellate Review 9
REASONS FOR GRANTING THE PETITION 11
I. THE COURT SHOULD GRANT, VACATE, AND REMAND FOR FURTHER CONSIDERATION IN LIGHT OF *CAPERTON*. 12
A. *Caperton* Forbids A Judge From Hearing A Case In Which Her Campaign Manager Is Lead Counsel 13
B. HCA Preserved Its Challenge To The Trial Judge's Eligibility By Following The Procedure Prescribed By State Law 14
II. IN THE ALTERNATIVE, PLENARY REVIEW IS WARRANTED TO RESOLVE A DEEP SPLIT OVER THE SAFEGUARDS THAT MUST BE AFFORDED PARTIES BEFORE THE IMPOSITION OF SEVERE SANCTIONS 16

TABLE OF CONTENTS—continued

Page

A. The Lower Courts Are Deeply Divided Regarding The Procedural Safeguards That Must Be Provided Before The Imposition Of Severe Sanctions.....17

B. The Oklahoma Courts' Understanding Of The Procedures Required By Due Process Is Manifestly Wrong.....24

C. This Case Is An Excellent Vehicle For Providing The Lower Courts With The Necessary Guidance On This Important And Recurring Issue.....30

CONCLUSION.....31

APPENDIX A: Opinion of the Oklahoma Court of Civil Appeals..... 1a

APPENDIX B: Opinion on Rehearing of the Oklahoma Court of Civil Appeals..... 32a

APPENDIX C: Order of the Oklahoma Supreme Court denying discretionary review, with dissenting opinion..... 64a

APPENDIX D: Order of the Oklahoma Supreme Court denying emergency stay and ordering hearing on recusal 66a

APPENDIX E: Order of the Oklahoma Supreme Court denying mandamus 68a

APPENDIX F: Transcript of Proceeding of Motions In Limine and Motion for Sanctions 70a

TABLE OF AUTHORITIES

Page(s)

CASES

1-10 Indus. Assocs. v. *United States*,
528 F.3d 859 (Fed. Cir. 2008) 19

Armstrong v. *Manzo*,
380 U.S. 545 (1965) 21, 25, 30

BMW of N. Am., Inc. v. *Gore*,
517 U.S. 559 (1996) 27

Caperton v. *A.T. Massey Coal Co.*,
129 S. Ct. 2252 (2009) ..... *passim*

Carr v. *Hovick*,
451 N.W.2d 815 (Iowa 1990) 19

Childs v. *State Farm Mut. Auto. Ins. Co.*,
29 F.3d 1018 (5th Cir. 1994) 22

Chrysler Corp. v. *Carey*,
186 F.3d 1016 (8th Cir. 1999) 23

Covey v. *Town of Somers*,
351 U.S. 141 (1956) 27

Dailey v. *Vought Aircraft Co.*,
141 F.3d 224 (5th Cir. 1998) 25, 29

Doulamis v. *Alpine Lake Property Owners Ass'n*, 399 S.E.2d 689 (W. Va. 1990) 22

Dyotherm Corp. v. *Turbo Mach. Co.*,
392 F.2d 146 (3d Cir. 1968) 22

FDIC v. *Conner*,
20 F.3d 1376 (5th Cir. 1994) 20

Fellheimer, Eichen & Braverman, P.C. v. *Charter Techs., Inc.*, 57 F.3d 1215 (3d Cir. 1995) 19

Goldman v. *Goldman*,
883 P.2d 181 (Okla. App. 1992) 28

TABLE OF AUTHORITIES—continued

Page(s)

Griffin v. *Griffin*,
500 S.E.2d 437 (N.C. 1998) 19

Hammond Packing Co. v. *Arkansas*,
212 U.S. 322 (1909) 17

Harris v. *Cuyler*,
664 F.2d 388 (3d Cir. 1981) 22

Heal v. *Heal*,
762 A.2d 463 (R.I. 2000) 29

Hovey v. *Elliott*,
167 U.S. 409 (1897) 17

In re 60 E. 80th St. Equities, Inc.,
218 F.3d 109 (2d Cir. 2000) 18, 26

In re DeVille,
361 F.3d 539 (9th Cir. 2004) 18

In re Kunstler,
914 F.2d 505 (4th Cir. 1990) 24

In re Marriage of Flaherty,
646 P.2d 179 (Cal. 1982) 22

In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions, 278 F.3d 175
(3d Cir. 2002) 19, 29, 31

In re Ruffalo,
390 U.S. 544 (1968) 28

Jensen v. *Fed. Land Bank*,
882 F.2d 340 (8th Cir. 1989) 18, 19

Jones v. *Pittsburgh Nat'l Corp.*,
899 F.2d 1350 (3d Cir. 1990) 18

Kapco Mfg. Co. v. *C & O Enters., Inc.*,
886 F.2d 1485 (7th Cir. 1989) 23

TABLE OF AUTHORITIES—continued

Page(s)

Kilpatrick v. *Bullough Abatement, Inc.*,
199 P.3d 957 (Utah 2008) 19, 27

Kirshner v. *Uniden Corp. of Am.*,
842 F.2d 1074 (9th Cir. 1988) 19, 27

Lambert v. *California*,
355 U.S. 225 (1957) 27

Lankford v. *Idaho*,
500 U.S. 110 (1991) 24, 27

Lawrence ex rel. Lawrence v. *Chater*,
516 U.S. 163 (1996) 12

Lindey's, Inc. v. *Goodover*,
872 P.2d 767 (Mont. 1994) 19

Lindsey v. *Normet*,
405 U.S. 56 (1972) 29

Mackler Prods., Inc. v. *Cohen*,
225 F.3d 136 (2d Cir. 2000) 18

Moakley v. *Smallwood*,
826 So. 2d 221 (Fla. 2002) 21

Ohio Furniture Co. v. *Mindala*,
488 N.E.2d 881 (Ohio 1986) 19, 27

Osterlund v. *State*,
30 A.2d 393 (Conn. 1943) 20

Pac. Harbor Capital, Inc. v. *Carnival Air Lines, Inc.*, 210 F.3d 1112 (9th Cir. 2000) 22

Participations Industrielles et Commerciales, S.A. v. *Rogers*, 357 U.S. 197 (1958) 17, 25, 27

Payne v. *DeWitt*,
995 P.2d 1088 (Okla. 1999) 26

TABLE OF AUTHORITIES—continued

Page(s)

Philip Morris USA v. *Williams*,
549 U.S. 346 (2007) 29

Pierce v. *Pierce*,
39 P.3d 791 (Okla. 2001) 15

Reece v. *Georgia*,
350 U.S. 85 (1955) 14

Resolution Trust Corp. v. *Dabney*,
73 F.3d 262 (10th Cir. 1995) 22

Riccard v. *Prudential Ins. Co.*,
307 F.3d 1277 (11th Cir. 2002) 20

Roadway Express, Inc. v. *Piper*,
447 U.S. 752 (1980) 17, 26

Schlaifer Nance & Co. v. *Estate of Warhol*,
194 F.3d 323 (2d Cir. 1999) 23

Silverman v. *Mut. Trust Life Ins. Co.*
(*In re Big Rapids Mall Assocs.*),
98 F.3d 926 (6th Cir. 1996) 23

Smith v. *Elec. Parts, Inc.*,
907 P.2d 958 (Mont. 1995) 21

Smith v. *Groleske*,
196 P.3d 1102 (Alaska 2008) 22

St. Paul Ins. Co. v. *Hayes*,
770 A.2d 611 (Me. 2001) 20

Tamari v. *Bache & Co. (Lebanon) S.A.L.*,
729 F.2d 469 (7th Cir. 1984) 20

Textor v. *Bd. of Regents of N. Ill. Univ.*,
711 F.2d 1387 (7th Cir. 1983) 29

Tom Growney Equip., Inc. v. *Shelley Irrigation Dev., Inc.*, 834 F.2d 833 (9th Cir. 1987) . 18, 19, 29

TABLE OF AUTHORITIES—continued

Page(s)

Town of New Hartford v. *Conn. Res. Recovery Auth.*, 970 A.2d 570 (Conn. 2009) 19

United Nuclear Corp. v. *Gen. Atomic Co.*, 629 P.2d 231 (N.M. 1980) 23

United States ex rel. Jimenez v. *Health Net, Inc.*, 400 F.3d 853 (10th Cir. 2005) 19

United States v. *1948 S. Martin Luther King Dr.*, 270 F.3d 1102 (7th Cir. 2001) 19

Urie v. *Thompson*, 337 U.S. 163 (1949) 14, 15

Uselman v. *Uselman*, 464 N.W.2d 130 (Minn. 1990) 22

Withrow v. *Larkin*, 421 U.S. 35 (1975) 13

CONSTITUTION, STATUTES, AND RULES

U.S. CONST. amend. XIV 1, 2

28 U.S.C. § 1257(a) 1

FED. R. CIV. P. 11 20

OKLA. STAT. tit. 12, § 3226 23

OKLA. STAT. tit. 12, § 3234 23

OKLA. STAT. tit. 20, § 1403 ..... 6, 14, 15

OKLA. DIST. CT. R. 15 ..... 6, 14, 15

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Jonathan J. Dunn & William J. King, *Discovery Sanctions as an Independent Case Strategy: An Alarming Trend in Litigation*, ABA FIDELITY & SURETY LAW COMM. NEWSLETTER, Winter 2002, at 17 28

PETITION FOR A WRIT OF CERTIORARI

Petitioners, HCA Health Services of Oklahoma, Inc., d/b/a OU Medical Center d/b/a Children's Hospital, and OU Medical Center (collectively, "HCA"), respectfully petition for a writ of certiorari to review the judgment of the Oklahoma Court of Civil Appeals in this case.

OPINIONS BELOW

The opinion of the Oklahoma Court of Civil Appeals (App., *infra*, 1a–31a) and its opinion on rehearing (*id.* at 32a–63a) are unpublished. The dissent accompanying the Oklahoma Supreme Court's denial of the petition for a writ of certiorari (*id.* at 64a–65a) is unpublished. The order of the Oklahoma Supreme Court denying HCA's petition for a writ of mandamus (*id.* at 66a–69a) is unpublished.

JURISDICTION

The judgment of the Oklahoma Court of Civil Appeals was entered on May 9, 2008. HCA timely filed a petition for discretionary review in the Oklahoma Supreme Court, which was denied on May 11, 2009. On July 20, 2009, Justice Breyer extended the time for filing a petition for a writ of certiorari until September 8, 2009. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> No State shall * * * deprive any person of life, liberty, or property, without due process of law.

STATEMENT

The Fourteenth Amendment guarantees that no person may be deprived of property without due process of law. In the context of civil litigation, this entitles a litigant to an impartial arbiter, meaningful notice, and the opportunity to mount every available defense before its property can be taken in the form of a damages judgment. In this case, the Oklahoma courts failed to provide petitioner HCA with any of those indispensable safeguards: HCA was denied an impartial arbiter and was subjected to a directed judgment of liability as a discovery sanction—resulting in an $18 million verdict—without either meaningful notice or the opportunity to put on a defense to the allegations that resulted in the sanction. Review and reversal are warranted to bring the Oklahoma courts into line with this Court's precedents and to resolve a deep division among the lower courts regarding the procedural safeguards that must be employed before a party can be subjected to a severe sanction such as dismissal or a directed judgment.

The first major deviation from due process occurred when the Oklahoma courts permitted the trial judge to continue presiding after lead counsel for the plaintiffs (respondents here) was named chairman of her reelection campaign. This Court has just confirmed that "a constitutionally intolerable probability of actual bias" exists when a state-court judge presides over an action involving the person "directing the judge's election campaign when the case was pending or imminent." *Caperton* v. *A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2262, 2263–2264 (2009). There can be no doubt that the trial judge was required to recuse herself under *Caperton* and that the Okla-

homa courts violated HCA's due process rights by allowing her to continue to preside. Because *Caperton* was not decided until after the Oklahoma courts had rebuffed HCA's efforts to obtain the trial judge's recusal, the petition should be granted, the judgment below vacated, and the case remanded for further consideration in light of *Caperton*.

Perhaps not coincidentally, the due process violations accelerated after the trial judge was given *carte blanche* to handle the case. Just days after the Oklahoma Supreme Court refused to disqualify her, she entered the most severe of possible discovery sanctions—a directed judgment of liability against HCA, followed by an exceptionally prejudicial jury instruction on punitive damages. This sanction was hastily imposed in response to a motion filed on the day the trial was scheduled to begin. Rather than allowing HCA a meaningful opportunity to respond, the trial judge set a hearing within the hour—barely giving HCA's counsel time to read the 19-page motion and contact their client. During that hearing, she refused to allow HCA either to submit a written response or to present evidence in its defense. Instead, without even so much as a recess to ponder the result or to review any of the disputed discovery, she took respondents' allegations at face value and immediately entered a sanction that stripped HCA of its right to defend against the allegations.

And the judge was not done. After a trial on damages, she instructed the jury that, in determining whether to impose punitive damages and in what amount, it could consider HCA's "perjury" and "disobedience of a direct Court order." So instructed, the jury awarded respondents $9 million in compensatory damages and $9 million in punitive damages.

The Oklahoma appellate courts found nothing wrong with either the procedure employed in imposing sanctions or the jury instruction on punitive damages. In embracing a process that lacked particularized notice, afforded HCA no meaningful opportunity to defend itself against the charges, and resulted in an $18 million deprivation of property, the Oklahoma courts deepened two ever-growing splits regarding the procedural safeguards that must be provided before the imposition of serious sanctions. Plenary review is warranted to resolve these two important divisions of authority.

A. Background

This case arises out of an accidental injury caused to Nathan Shinn, an infant child, by a night nurse at the Children's Hospital at Oklahoma University Medical Center, a facility owned by HCA. App., *infra*, 2a. Nathan was in the hospital because he had been born with a congenital brain anomaly known as holoprosencephaly. Trial Tr. 204, 517, 528. As a symptom of this tragic condition, Nathan's brain was one-third of the normal size, and Nathan had no prospect for long-term survival. *Id.* at 204–205. Indeed, he died from this condition shortly after the trial in this case. During his stay in the hospital, Nathan sustained injuries to his skull when Nurse Renny Jacob hit his head against a nightstand while changing his crib sheets. App., *infra*, 2a. The injuries resolved themselves without medical intervention, and Nurse Jacob, who initially denied knowledge of the incident, soon thereafter confessed her involvement and resigned from her position. *Id.* at 3a.

Respondents sued HCA in Oklahoma district court on July 11, 2005, alleging negligence and seek-

ing compensatory and punitive damages. The case was assigned to District Judge Barbara G. Swinton, who was elected in 2002 and faced a reelection campaign in 2006.

B. Pretrial Proceedings

During the pretrial proceedings, the parties had a series of disputes about the scope of discovery and Judge Swinton's eligibility to preside over the case.

After the parties exchanged document requests and objections, HCA filed a motion to compel respondents to provide a signed authorization to release certain medical records. The court granted HCA's motion and ordered respondents to supplement their discovery by May 11, 2006. Respondents missed that deadline and belatedly provided some additional discovery on May 30 but failed to include the signed release ordered by the court. After a round of correspondence between counsel, HCA filed a motion for discovery sanctions on July 20. Meanwhile, on July 17, respondents filed their own motion to compel, which HCA moved to strike as procedurally improper. On August 25, the trial court denied HCA's motion for sanctions and reserved ruling on HCA's motion to strike while simultaneously ordering HCA to supplement its discovery. HCA made supplemental productions on August 30 and September 20.

While discovery was ongoing, HCA learned that respondents' lead counsel, Jerry Durbin, had become the chairman of Judge Swinton's reelection campaign[1] and that Mr. Durbin and his law firm col-

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[1] See Petitioners' Appendix ("Mandamus Pet. App.") A, ex. A, *HCA Health Services of Oklahoma, Inc.* v. *Swinton*, No. 103,926 (Okla. filed Oct. 27, 2006), available at https://www.ok.gov/

leagues were responsible for 27% of Judge Swinton's campaign contributions.[2] HCA believed that Judge Swinton's conflict of interest violated its due process rights and sought to disqualify Judge Swinton from further participation in the case.

Oklahoma law dictates a four-step process for seeking the disqualification of a trial court judge. See OKLA. STAT. tit. 20, § 1403; OKLA. DIST. CT. R. 15. A party must first make an informal request for recusal. If the judge declines to recuse, the party must next make a formal motion to the trial judge. If the judge still will not recuse, the party may represent the formal request to the chief judge of the county where the case is pending. If the chief judge refuses to intervene, the aggrieved party then may file a mandamus petition in the Oklahoma Supreme Court. *Ibid.*

Following that procedure, on September 21, 2006, HCA requested *in camera* that Judge Swinton recuse herself. App., *infra*, 59a; Mandamus Pet. App. C. She refused but stayed further consideration of HCA's motion to strike respondents' motion to compel additional discovery pending appellate review of the recusal issue. Mandamus Pet. App. C, at 15–16. The next day, HCA filed its formal recusal motion with Judge Swinton (Mandamus Pet. App. A), which she denied on the spot (Mandamus Pet. App. B, at 12). HCA then sought review from the chief judge, who on October 5 concluded that he lacked jurisdiction because Judge Swinton had denied the

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ethics/crs/so1/view_so1.php?reg_id=106308&action=public&report_num=41083.

[2] See Mandamus Pet. App. A, ex. B, available at https://www.ok.gov/ethics/crs/c1r/view_c1r.php?reg_id=106308&action=public&report_num=41784.

formal recusal motion without first conducting a hearing. Mandamus Pet. App. B, at 13.

On October 13, HCA filed a petition for a writ of mandamus or prohibition in the Oklahoma Supreme Court. *HCA Health Servs. of Okla., Inc.* v. *Swinton*, No. 103,870 (Okla. filed Oct. 13, 2006). The court scheduled argument for November 7. Because trial was set to begin on October 30, HCA sought an emergency stay, which prompted the Oklahoma Supreme Court to advance the hearing to October 20. On October 26, the court denied the emergency stay but instructed the chief judge of the trial court to hold his own hearing on the recusal issue by the end of that day. App., *infra*, 66a. The chief judge held his hearing and upheld the trial judge's refusal to recuse. Mandamus Pet. App. B, at 17.

HCA then renewed its petition for mandamus in the Oklahoma Supreme Court (*HCA Health Servs. of Okla., Inc.* v. *Swinton*, No. 103,926 (Okla. filed Oct. 27, 2006)), contending that the trial judge's continued participation in the case violated the Due Process Clause. On October 27, the court accepted jurisdiction over the mandamus petition, but—over the dissent of Justice Opala—denied the writ. App., *infra*, 68a–69a.

That same day, pursuant to a three-day-old order from Judge Swinton denying HCA's motion to strike (Mandamus Pet. App. B, at 16), HCA supplemented its discovery responses for the third time. By this point, only three days remained before trial.

C. Sanctions

On the day trial was scheduled to commence, respondents filed a written motion seeking discovery sanctions. In their 19-page motion, respondents

complained about the timing of discovery (which HCA viewed as a function of the recusal process and the accompanying stay) and HCA's failure to produce certain documents (most of which did not exist). HCA sought the opportunity to review the motion and to respond in writing, but Judge Swinton insisted on a hearing within the hour. At the hearing, HCA reiterated its position that it had not received adequate notice and that it was entitled to an opportunity to formulate a response and to submit evidence that would rebut respondents' allegations. App., *infra*, 101a. Instead, having reviewed none of the discovery materials that were produced by HCA, the court took the representations of respondents' counsel at face value, ruled immediately from the bench that HCA had committed discovery violations, directed a judgment against HCA on liability, and ordered that a trial on damages commence the next day. *Id.* at 101a–104a. In issuing this ruling, Judge Swinton specifically faulted HCA for "hoping that the Motion to Disqualify the trial judge would get them the continuance they previously sought" and opined that HCA's efforts to disqualify her "may have played [a] part in the failure to provide the necessary documents in this case for the plaintiffs to be properly prepared." *Id.* at 102a.

At the conclusion of the trial, the court instructed the jury that HCA had "conducted itself in violation of the laws of the State of Oklahoma," that "[t]his conduct ha[d] occurred in [her] Courtroom" and "include[d] a violation of the laws of the State of Oklahoma, as to perjury and disobedience of a direct Court order," and that, in determining the appropriateness and amount of punitive damages for HCA's tort, the jury could "consider [HCA's] perjury and direct disobedience of a Court order." App., *infra*, 34a–

35a. Having been thus instructed, the jury returned a verdict of $9 million in compensatory damages and $9 million in punitive damages.

D. Appellate Review

HCA appealed, raising a range of issues. The Oklahoma Court of Civil Appeals affirmed in all respects. App., *infra*, 1a–31a.

The court acknowledged that there was no evidence that HCA had been warned of the possible sanction it faced but concluded that "affirmative notice from the Trial Court informing HCA of the possibility of a directed verdict was unnecessary because the record clearly demonstrates that counsel for HCA was aware of, and indeed asked for, a similar discovery sanction." App., *infra*, 11a. Thus, because HCA had filed its own motion for discovery sanctions, the court concluded that HCA "had sufficient notice of the sanction ultimately imposed." *Ibid.* The court failed to address HCA's contention that it was denied an opportunity to be heard before the sanction was imposed.

In an opinion accompanying the denial of rehearing, the court specifically addressed the district court's denial of "counsel's request for the opportunity to file a written response to the factual assertions in [respondents'] motion and to supplement the record with the documents produced by HCA." App., *infra*, 54a. The court "beg[a]n with the observation that the timing of the [sanctions] hearing * * * was primarily the result of HCA's untimely discovery responses" (*ibid.*) and concluded that there was no violation of due process because "[t]he sanctions hearing concerned what HCA had failed to do" and "[t]he record establishes that there was a significant discrep-

ancy between what the district court ordered HCA to produce on August 25, and what it produced in response to that order" (*id.* at 55a). The court reasoned that HCA was not entitled to submit documents to show that "it had substantially complied with the [trial] court's order," because "it is clear that substantial compliance was not satisfactory to the district court." *Id.* at 57a.[3]

Finally, the court concluded that any due process violation stemming from the trial court's failure to permit a written response was cured when, after the sanctions had been entered and the verdict was rendered, the trial court permitted HCA to submit a written response to a motion for *additional* sanctions filed by respondents. App., *infra*, 55a.

HCA timely petitioned for discretionary review in the Oklahoma Supreme Court. Over the dissents of three justices, certiorari was denied. App., *infra*, 64a. Vice-Chief Justice Taylor filed a written dissent in which he decried the "fundamental denial of the right to a fair trial" that resulted from Judge Swinton's punitive damages instruction. *Id.* at 65a. In his view, "[a]fter the trial judge branded the defendant an outlaw and a perjurer, any hope of a fair trial for the defendant was lost." *Ibid.* As he saw it, although the punitive damages instruction "might have been given to a jury in an entertaining movie or television show, * * * it should never have been given to a jury in an Oklahoma courtroom." *Ibid.*

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[3] Ironically, in reviewing the substance of the sanction order, the Court of Civil Appeals refused to consider documents, subpoenas, summonses, and notices of deposition because they "were not before the Trial Court at the time of the decision appealed." App., *infra*, 7a n.2.

REASONS FOR GRANTING THE PETITION

As this Court held just three months ago in *Caperton*, due process requires a judge to recuse herself from any case in which a person with a personal stake has had a significant and disproportionate influence in directing the judge's election campaign. Here, while the case was ongoing, respondents' lead attorney was serving as chairman of the trial judge's reelection campaign. Judge Swinton's failure to recuse herself accordingly violated HCA's due process rights. Because the Oklahoma Supreme Court denied HCA's due process claim without the benefit of *Caperton*, the Court should grant the petition, vacate the judgment below, and remand for further consideration in light of *Caperton*.

Even setting aside the recusal issue, there is an independent basis warranting plenary review. Judge Swinton entered a devastating sanction against HCA for alleged discovery shortcomings—a directed judgment on liability plus a judicial assertion that HCA committed "perjury," the inevitable effect of which was to inflame the jury into returning an award that was out of all proportion to respondents' injuries and the gravity of the underlying conduct attributable to HCA. But in its rush to judgment, the court failed to provide particularized notice of the sanction it was considering and the basis therefor and denied HCA the opportunity to explain—with evidence—that the sanctions motion was based on inaccurate and misleading factual assertions. Although lower courts routinely consider and impose severe sanctions, they are divided on whether, in such circumstances, due process requires particularized notice and the opportunity to present evidence or a written response.

I. THE COURT SHOULD GRANT, VACATE, AND REMAND FOR FURTHER CONSIDERATION IN LIGHT OF *CAPERTON*.

This Court should grant the petition, vacate the judgment below, and remand for further consideration ("GVR") in light of *Caperton*. The Oklahoma courts considered whether due process required Judge Swinton to recuse herself in 2006. The Oklahoma Supreme Court denied discretionary review of the final judgment on May 11, 2009. Less than a month later, on June 8, this Court issued its decision in *Caperton*, which bears directly on the recusal issue in this case.

As this Court has explained, a GVR order is appropriate

> [w]here intervening developments, or recent developments that [this Court] ha[s] reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation.

Lawrence ex rel. Lawrence v. *Chater*, 516 U.S. 163, 167 (1996) (per curiam). That standard is satisfied here, because *Caperton* requires a judge to disqualify herself from a case in which her campaign manager represents a party. The fact that the Oklahoma Supreme Court considered this issue in ruling on an interlocutory mandamus petition is no obstacle to a GVR order.

A. *Caperton* Forbids A Judge From Hearing A Case In Which Her Campaign Manager Is Lead Counsel.

The Constitution requires recusal when "the probability of actual bias on the part of the judge or decisionmaker is too high." *Withrow* v. *Larkin*, 421 U.S. 35, 47 (1975). In *Caperton*, this Court addressed the applicability of this recusal requirement to judges who, pursuant to state law, win their jobs through public election. The Court held that due process is violated "when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent." *Caperton*, 129 S. Ct. at 2263–2264. Needless to say, an attorney working on a contingency-fee basis has just such "a personal stake" in the outcome of a tort case. Indeed, the decision itself expressly reaches attorneys. *Id.* at 2263.

The principle set forth in *Caperton* applies squarely to this case. While the case was pending, respondents' lead attorney was "directing the judge's election campaign" by serving as chairman of Judge Swinton's reelection campaign. In addition, that lawyer's firm accounted for 27% of Judge Swinton's campaign contributions. The probability of bias resulting from the judge's relationship with lead counsel is manifest on its face, and is confirmed by the judge's uncritical acceptance of the allegations by respondents' counsel in their sanctions motion and at the hearing.

Because the courts below did not have the benefit of *Caperton* when they rejected HCA's argument that

due process required the trial judge to recuse, a GVR is plainly warranted.

B. HCA Preserved Its Challenge To The Trial Judge's Eligibility By Following The Procedure Prescribed By State Law.

Although the Oklahoma Supreme Court issued its ruling on Judge Swinton's disqualification before trial, that is no obstacle to a GVR. This Court has the power to "consider all of the substantial federal questions determined in the earlier stages of the litigation" (*Reece* v. *Georgia*, 350 U.S. 85, 87 (1955)), even if they were not passed upon during the final appeal in the case. The "power to probe issues disposed of on appeals prior to the one under review is, in the last analysis, a 'necessary correlative' of the rule which limits [this Court] to the examination of final judgments." *Urie* v. *Thompson*, 337 U.S. 163, 172–173 (1949).

HCA preserved this Court's review of Judge Swinton's eligibility to preside over the case by following the procedure for interlocutory review prescribed by Oklahoma law. As the Oklahoma Supreme Court has explained:

> a party seeking disqualification of a judge in a civil proceeding must make an *in camera* request of the judge to disqualify or to transfer the cause to another judge as required by Rule 15, and then upon the judge's refusal the party must file a written application in the cause, as required by [OKLA. STAT. tit. 20,] § 1403, and upon refusal of the motion, re-present the motion to the Chief Judge or the Presiding Judge as required by [Okla-

> homa District Court] Rule 15. * * * [I]f the judge is not then disqualified as requested, the party seeking disqualification may seek extraordinary relief in the form of mandamus as authorized by Rule 15 and § 1403, *or as an alternative to a mandamus proceeding*, preserve the disqualification issue for review on appeal from the subsequent judgment.

Pierce v. *Pierce*, 39 P.3d 791, 796 (Okla. 2001) (emphasis added); see also *ibid.* ("after a party preserves the disqualification issue in the trial court the alleged error may be raised by a mandamus proceeding *or* in a subsequent appeal") (emphasis in original).

Here, HCA preserved the recusal issue by making the *in camera* request required by Rule 15, the written application required by § 1403, the representation required by Rule 15, and the mandamus petition to the Oklahoma Supreme Court, which accepted briefs, heard arguments, and rendered a ruling that prompted a dissent.

The interlocutory nature of this review process is inconsequential: "Local rules of practice cannot bar this Court's independent consideration of all substantial federal questions actually determined in earlier stages of the litigation by the court whose final adjudication is brought here for review." *Urie*, 337 U.S. at 172. Accordingly, the recusal issue was fully preserved.[4]

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[4] In its order denying rehearing, the Oklahoma Court of Civil Appeals addressed HCA's contention that Judge Swinton violated Oklahoma law by ruling on various issues while the disqualification proceedings were ongoing. In the course of this discussion, the court noted that "HCA did not appeal the chief judge's order denying the motion to disqualify and that ruling is

II. IN THE ALTERNATIVE, PLENARY REVIEW IS WARRANTED TO RESOLVE A DEEP SPLIT OVER THE SAFEGUARDS THAT MUST BE AFFORDED PARTIES BEFORE THE IMPOSITION OF SEVERE SANCTIONS.

In addition to the *Caperton* issue, this case presents a recurring issue of great importance that merits plenary review. Although this Court has indicated that parties must receive notice and an opportunity to be heard before sanctions can be imposed, the lower courts are divided as to both the nature of the notice required and the extent of a party's entitlement to respond. The exceedingly minimalist view espoused by the Oklahoma courts in this case conflicts with multiple decisions of federal courts of appeals and state courts of last resort. Those courts have held that parties must be given both particularized notice in advance of the hearing and the opportunity to present evidence or written arguments in response to allegations of sanctionable conduct.

Because litigants increasingly are wielding discovery sanctions as a sword, this Court's review is urgently needed to harmonize the law and to ensure that parties receive the procedural protections to which due process entitles them.

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now final." App., *infra*, 61a. That may be true for purposes of the Oklahoma Court of Civil Appeals' ability to revisit the propriety of Judge Swinton's refusal to recuse at the rehearing stage, but it is irrelevant to whether the interlocutory procedure prescribed by Oklahoma law and followed by HCA was sufficient to preserve the issue for *this Court's* review.

A. The Lower Courts Are Deeply Divided Regarding The Procedural Safeguards That Must Be Provided Before The Imposition Of Severe Sanctions.

A court contemplating the imposition of sanctions must comport with due process, because "there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." *Societe Internationale pour Participations Industrielles et Commerciales, S.A.* v. *Rogers*, 357 U.S. 197, 209 (1958). This principle is deeply rooted. See, *e.g.*, *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322, 349–351 (1909); *Hovey* v. *Elliott*, 167 U.S. 409, 417–418 (1897). More recently, this Court has cautioned that, regardless of the alleged misconduct or the contemplated penalty, sanctions "certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record." *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, 767 (1980). Otherwise, courts would "possess the right to inflict the very wrongs which they were created to prevent." *Hovey*, 167 U.S. at 418.

All courts—including the court below (App., *infra*, 52a–53a)—recognize that "notice" and the "opportunity to be heard" are constitutional imperatives. But they part ways soon thereafter, revealing intolerable variations in the procedural safeguards that are afforded to parties confronted with the threat of severe sanctions.

By holding that parties threatened with sanctions are entitled to neither particularized notice nor an opportunity to make a written response or introduce evidence in their defense, the Oklahoma courts

have widened two already deep divisions among the lower courts. This Court's intervention is required to provide necessary guidance as to the safeguards that must be afforded parties before the imposition of serious sanctions.

1. As the Eighth Circuit has recognized, "[c]ourts are split on whether" there exists "a right to prior notice before the imposition of sanctions." *Jensen* v. *Fed. Land Bank*, 882 F.2d 340, 341 (8th Cir. 1989).

The Second, Third, Ninth, Tenth, and Federal Circuits and four state supreme courts have concluded that due process requires particularized notice. For example, the Second Circuit has held that,

> [a]t a minimum, the notice requirement mandates that the subject of a sanctions motion be informed of: (1) the source of authority for the sanctions being considered; and (2) the specific conduct or omission for which the sanctions are being considered.

Mackler Prods., Inc. v. *Cohen*, 225 F.3d 136, 144 (2d Cir. 2000) (quoting *In re 60 E. 80th St. Equities, Inc.*, 218 F.3d 109, 117 (2d Cir. 2000)). The Ninth Circuit has likewise held that "particularized notice is required to comport with due process" (*In re DeVille*, 361 F.3d 539, 549 (9th Cir. 2004) (internal quotation marks omitted)), and it has expressly recognized that there is "a distinction between the general notice about sanctions and notice that sanctions are being considered" (*Tom Growney Equip., Inc.* v. *Shelley Irrigation Dev., Inc.*, 834 F.2d 833, 836 n.5 (9th Cir. 1987)). In the jurisdictions that follow this approach, the notice must identify "particular factors that [the party facing sanctions] must address if [it] is to avoid sanctions" (*Jones* v. *Pittsburgh Nat'l Corp.*, 899 F.2d

1350, 1357 (3d Cir. 1990)) and "will usually require notice of the precise sanctioning tool that the court intends to employ" (*In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 278 F.3d 175, 191 (3d Cir. 2002) (quoting *Fellheimer, Eichen & Braverman, P.C.* v. *Charter Techs., Inc.*, 57 F.3d 1215, 1225 (3d Cir. 1995))).[5] In these jurisdictions, the requirement of particularized notice applies regardless of the nature of the sanction, and regardless of whether the sanction is to be levied against the party or the party's attorney. Moreover, the required notice must give the party threatened with sanctions "sufficient time in which to prepare its case against imposition of sanctions." *Lindey's, Inc.* v. *Goodover*, 872 P.2d 767, 772 (Mont. 1994).[6]

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[5] See also *1-10 Indus. Assocs.* v. *United States*, 528 F.3d 859, 867–868 (Fed. Cir. 2008) (collecting cases); *United States ex rel. Jimenez* v. *Health Net, Inc.*, 400 F.3d 853, 857 (10th Cir. 2005) ("Due process requires us to give Appellants notice that we are contemplating imposing sanctions and an opportunity to respond."); *Jensen*, 882 F.2d at 341 (8th Cir.) (adopting holding of *Tom Growney*); *Carr* v. *Hovick*, 451 N.W.2d 815, 819 (Iowa 1990) ("[t]o comport with due process, the court here should have notified [the party's] counsel that sanctions were being contemplated"); *Ohio Furniture Co.* v. *Mindala*, 488 N.E.2d 881, 883 (Ohio 1986) (per curiam); *Griffin* v. *Griffin*, 500 S.E.2d 437, 439 (N.C. 1998) ("It is not adequate for the notice to say only that sanctions are proposed. The bases for the sanctions must be alleged."); *Kilpatrick* v. *Bullough Abatement, Inc.*, 199 P.3d 957, 967 (Utah 2008).

[6] See also *United States* v. *1948 S. Martin Luther King Dr.*, 270 F.3d 1102, 1116 (7th Cir. 2001) (reversing sanction where party was denied "adequate time to prepare a response"); *Kirshner* v. *Uniden Corp. of Am.*, 842 F.2d 1074, 1082 (9th Cir. 1988) (finding two days to be "inadequate time to prepare a defense and to travel * * * to attend the hearing"); *Town of New Hartford* v. *Conn. Res. Recovery Auth.*, 970 A.2d 570, 577 (Conn. 2009) ("It

In contrast, the Fifth, Seventh, and Eleventh Circuits and the Maine Supreme Judicial Court agree with the Oklahoma courts that virtually *any* notice is sufficient. The rule in the Fifth Circuit is illustrative: "Like all court orders, discovery orders are to be obeyed when issued, and sanctions for violating such orders may be imposed without an explicit prior warning or a litany of precautionary instructions." *FDIC* v. *Conner*, 20 F.3d 1376, 1383 (5th Cir. 1994).[7]

This understanding of the notice requirement—and its role in effectuating due process—differs markedly from that of the jurisdictions that have held that due process requires particularized notice. As a consequence, the constitutional safeguards afforded parties facing sanctions depend entirely on the jurisdiction in which the case arises. The present case well illustrates that. If this case had arisen in any of the jurisdictions that construe due process to require particularized notice, the sanction imposed

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is well established that '[i]t is fundamental in proper judicial administration that no matter shall be decided unless the parties have fair notice that it will be presented in sufficient time to prepare themselves upon the issue.'") (quoting *Osterlund* v. *State*, 30 A.2d 393, 395–396 (Conn. 1943)).

[7] See also *Riccard* v. *Prudential Ins. Co.*, 307 F.3d 1277, 1294 (11th Cir. 2002) ("Rule 11 itself 'constitutes a form of notice' that sanctions can be imposed for a baseless motion"); *Tamari* v. *Bache & Co. (Lebanon) S.A.L.*, 729 F.2d 469, 472 (7th Cir. 1984) ("In general, where a party has received adequate notice that certain discovery proceedings are to occur by a specific date, and that party fails to comply, a court may impose sanctions without a formal motion to compel the discovery from the opposing party."); *St. Paul Ins. Co.* v. *Hayes*, 770 A.2d 611, 615 (Me. 2001) ("We have never said that the trial court must 'warn' a party before sanctioning that party with dismissal or default.").

by the trial court here would have been deemed unconstitutional, because the Oklahoma Court of Civil Appeals acknowledged the absence of "explicit evidence" of "affirmative notice from the Trial Court informing HCA of the possibility of a directed verdict" (App., *infra*, 10a–11a), let alone notice that HCA would be branded a perjurer. Moreover, HCA was given less than an hour before being called to the dock to defend itself. That clearly would have resulted in reversal in the many jurisdictions that recognize that the right to defend is meaningless without adequate time to prepare.

2. The lower courts likewise are divided as to the scope of a party's due process right to be heard prior to the imposition of severe sanctions. This Court has explained that the opportunity to be heard "must be granted at a meaningful time and in a meaningful manner" (*Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965)), but the lower courts have deviated dramatically as to what that means.

First, several state courts of last resort have concluded that due process requires that the party confronted with the threat of serious sanctions be afforded an evidentiary hearing. The Montana Supreme Court, for example, has held that "a hearing is necessary to provide the party with due process by affording it a sufficient opportunity to defend against the imposition of sanctions." *Smith* v. *Elec. Parts, Inc.*, 907 P.2d 958, 962 (Mont. 1995). The Florida Supreme Court has similarly held that, under the Due Process Clause, the party against whom sanctions are sought must be afforded "the opportunity to present witnesses and other evidence." *Moakley* v. *Smallwood*, 826 So. 2d 221, 227 (Fla. 2002). For its part, the West Virginia Supreme Court of Appeals

has ruled that due process requires that, before rendering judgment on liability as a sanction, courts must conduct "an evidentiary hearing," during which the party seeking the sanction bears the burden of establishing willful noncompliance with a court order and the opposing party is afforded the opportunity to justify its noncompliance. *Doulamis* v. *Alpine Lake Property Owners Ass'n*, 399 S.E.2d 689, 693–694 (W. Va. 1990) (per curiam). The Alaska Supreme Court has likewise interpreted the Due Process Clause to require an evidentiary hearing "on issues of consequence" (*Smith* v. *Groleske*, 196 P.3d 1102, 1106 (Alaska 2008)), as have the supreme courts of Minnesota (*Uselman* v. *Uselman*, 464 N.W.2d 130, 144 (Minn. 1990)) and California (*In re Marriage of Flaherty*, 646 P.2d 179, 190 (Cal. 1982)).

Second, although they do not require a full evidentiary hearing, at least four federal courts of appeals have held that due process requires an opportunity to respond in writing before sanctions can be imposed. The Fifth, Ninth, and Tenth Circuits have required at least the opportunity to brief potential sanctions (*Pac. Harbor Capital, Inc.* v. *Carnival Air Lines, Inc.*, 210 F.3d 1112, 1118 (9th Cir. 2000); *Resolution Trust Corp.* v. *Dabney*, 73 F.3d 262, 268 (10th Cir. 1995); *Childs* v. *State Farm Mut. Auto. Ins. Co.*, 29 F.3d 1018, 1027 (5th Cir. 1994)), and the Third Circuit, recognizing that "[d]ismissal is a harsh sanction which should be resorted to only in extreme cases" (*Dyotherm Corp.* v. *Turbo Mach. Co.*, 392 F.2d 146, 148–149 (3d Cir. 1968)), has vacated such a sanction where the sanctioned party was not "afforded an opportunity to explain the circumstances" of the alleged misconduct (*Harris* v. *Cuyler*, 664 F.2d 388, 390 (3d Cir. 1981)). Certainly, none of these courts would have upheld a directed judgment

imposed as a sanction one hour after the filing of a written motion without affording the accused party the opportunity to present evidence in its defense.

Third, several courts have held that, because "[a]n evidentiary hearing serves as a forum for finding facts," such a hearing is unnecessary "when sanctions are based entirely on an established record." *Schlaifer Nance & Co.* v. *Estate of Warhol*, 194 F.3d 323, 335 (2d Cir. 1999). Following this rule, the New Mexico Supreme Court has held that evidentiary hearings are unnecessary if the misconduct is "mirrored in the record." *United Nuclear Corp.* v. *Gen. Atomic Co.*, 629 P.2d 231, 237 (N.M. 1980). The Sixth, Seventh, and Eighth Circuits have held similarly. See *Chrysler Corp.* v. *Carey*, 186 F.3d 1016, 1022 (8th Cir. 1999); *Silverman* v. *Mut. Trust Life Ins. Co.* (*In re Big Rapids Mall Assocs.*), 98 F.3d 926, 929 (6th Cir. 1996); *Kapco Mfg. Co.* v. *C & O Enters., Inc.*, 886 F.2d 1485, 1495 (7th Cir. 1989) (per curiam).

The Oklahoma courts have adopted a fourth position, at the least protective end of the spectrum. They rejected HCA's request for an evidentiary hearing. They refused to allow HCA to submit a written response to respondents' 19-page written motion. And they did not base their sanctions on evidence already in the record. To the contrary, they relied solely on the representations made by respondents in their motion and at the hearing. See App., *infra*, 54a–55a.[8] In adopting this position, the Oklahoma

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[8] Indeed, the evidence necessary for the trial court's sanctions *could not* have appeared in the record. Under Oklahoma law, as in federal courts, discovery requests and responses are not filed in court. See, *e.g.*, OKLA. STAT. tit. 12, §§ 3226, 3234.

courts are joined only by the Fourth Circuit, which has rejected the holdings of other courts that allegations of bad faith require an evidentiary hearing in favor of the blanket position that "[d]ue process does not require an evidentiary hearing before sanctions are imposed." *In re Kunstler*, 914 F.2d 505, 521 (4th Cir. 1990). By embracing such a narrow notion of the right to be heard, the Oklahoma courts have further widened a schism that only this Court can close.

B. The Oklahoma Courts' Understanding Of The Procedures Required By Due Process Is Manifestly Wrong.

The Oklahoma courts held that it is perfectly permissible to impose a directed judgment of liability and to tell a jury that the defendant perjured itself and violated express court orders after less than an hour's notice and without affording the defendant the opportunity to introduce evidence or to submit a written response to the allegations upon which the motion for sanctions is based. With respect to both notice and the opportunity to be heard, the Oklahoma courts' minimalist approach is manifestly wrong.

1. Although "the concept of fair notice [is] the bedrock of any constitutionally fair procedure" (*Lankford* v. *Idaho*, 500 U.S. 110, 120–121 (1991)), HCA was never told—until the moment the trial court ruled from the bench—that the court questioned its compliance with existing court orders or was contemplating the draconian sanction that it ultimately imposed. The brief time that elapsed between indictment and conviction was materially indistinguishable from a sanction meted out on the spot and divested the "opportunity to be heard" of any practical significance.

Greater and more specific notice would have allowed HCA to offer a more effective response to the exaggerated charges levied by respondents. With less than an hour to read the motion and to communicate among themselves and with their client, counsel for HCA had no opportunity to perform legal research on the applicable standards, no opportunity to review HCA's document productions in order to demonstrate compliance with court orders, and no opportunity to marshal evidence showing that various documents requested by respondents did not exist. And although a showing of "willfulness" is constitutionally required before an adverse judgment can be entered as a sanction (*Societe Internationale*, 357 U.S. at 212), HCA had neither the knowledge that the trial court was contemplating that sanction nor the time to establish the steps it had taken to comply with its obligations in good faith. The Constitution requires notice at a "meaningful" time (*Armstrong*, 380 U.S. at 552), but the trial court's insistence on holding a hearing (and ruling from the bench) less than an hour after service of the motion for sanctions rendered the concept of fair notice meaningless.[9]

The Oklahoma Court of Civil Appeals asserted that "the timing of the hearing on the Shinns' motion [for sanctions] was primarily the result of HCA's untimely discovery responses." App., *infra*, 54a. However, the notion that a party can be deprived of a fair opportunity to defend itself simply because the court believes the other side's assertions that the party is guilty as charged is foreign to American jurispru-

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[9] See also *Dailey* v. *Vought Aircraft Co.*, 141 F.3d 224, 231 (5th Cir. 1998) (finding due process violation where party was "given only two days' or less notice of the hearing").

dence. Much to the contrary, as this Court has recognized, the need for fair procedures is particularly acute when a court evaluates conduct that could result in litigation-ending sanctions. *Roadway Express*, 447 U.S. at 767.

On the merits of the issue, the Oklahoma Court of Civil Appeals held that, under the Oklahoma Supreme Court's decision in *Payne* v. *DeWitt*, 995 P.2d 1088 (Okla. 1999), the Due Process Clause does not require particularized, advance notice and instead is satisfied whenever "a litigant on whom the discovery sanction of a directed verdict is imposed [is] warned [of the possibility of the sanction] by any source, including the litigant's own counsel." App., *infra*, 11a.[10] The court held that the notice requirement was satisfied here because HCA filed its own motion for discovery sanctions against respondents and thereby indicated its awareness that discovery violations can result in sanctions. *Ibid.* Thus, there was no need for "explicit evidence" that "notice was given" by the court that it was considering the premature termination of HCA's right to defend itself. *Id.* at 10a.

This minimalist understanding of "notice" strips the constitutional guarantee of any practical value. Notice is necessary "so that the subject of the sanctions motion can prepare a defense." *60 E. 80th St. Equities*, 218 F.3d at 117. Additionally, it ensures that "the judge will have time to consider the severity and propriety of the proposed sanction in light of the attorneys' explanation for their conduct" and facilitates appellate review by guaranteeing that "the

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[10] The court confirmed the constitutional nature of this ruling in its opinion on rehearing. See App., *infra*, 52a.

facts supporting the sanction will appear in the record." *Kirshner* v. *Uniden Corp. of Am.*, 842 F.2d 1074, 1082 (9th Cir. 1988). Moreover, the requirement of particularized notice can play an important curative role: If "the sanctioned party is on notice that its pattern of behavior will result in sanctions if it continues" (*Kilpatrick* v. *Bullough Abatement, Inc.*, 199 P.3d 957, 967 (Utah 2008)), the party has "one last chance to obey the court order in full" before the entry of a sanction that might deprive it of its right to a trial (*Ohio Furniture Co.* v. *Mindala*, 488 N.E.2d 881, 883 (Ohio 1986) (per curiam)). Contrary to the evident belief of the Oklahoma courts, severe sanctions such as dismissal or a directed judgment on liability should be reserved for truly defiant conduct (see *Societe Internationale*, 357 U.S. at 212), not awarded as the grand prize in a game of "gotcha."

Unsurprisingly, given the central role that notice has always played as a bulwark of due process, the viewpoint of the Oklahoma Court of Civil Appeals is irreconcilable with this Court's precedents. The Court has explained that "[n]otice is required in a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act" (*Lambert* v. *California*, 355 U.S. 225, 228 (1957)) or on the basis of actions already taken. Indeed, "[e]lementary notions of fairness enshrined in [this Court's] jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 574 (1996). This Court has required particularized notice in a wide range of scenarios—from the possible foreclosure on a tax lien (*Covey* v. *Town of Somers*, 351 U.S. 141, 146 (1956)) to the possible imposition of the death penalty (*Lankford*,

500 U.S. at 122). One particularly instructive case—*In re Ruffalo*, 390 U.S. 544 (1968)—involved attorney disciplinary proceedings. In *Ruffalo*, this Court considered whether misconduct identified for the first time during a disciplinary hearing could be the basis for sanctions. The Court concluded that the "absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived [the attorney facing discipline] of procedural due process." *Id.* at 552. Under that standard, particularized notice is required, and the decision below should be reversed.

2. When a party faces sanctions, notice is useless without a meaningful opportunity to respond. After providing insufficient notice, the Oklahoma courts compounded their error by refusing to allow HCA "to file a written response to the factual assertions in the Shinns' motion [or] to supplement the record with the documents produced by HCA." App., *infra*, 54a.

Although the court below acknowledged that, under this Court's precedents, a trial court may not dismiss an action for a *plaintiff's* discovery violation "without affording [the] party the opportunity for a hearing on the merits of the cause" (App., *infra*, 53a (quoting *Goldman* v. *Goldman*, 883 P.2d 181, 184 (Okla. App. 1992))), it concluded that no hearing is necessary before a court imposes a directed judgment of liability for a *defendant's* discovery violation. The court concluded that it was sufficient that "counsel for the Shinns made a detailed record." *Id.* at 54a.

That rationale is manifestly incorrect. As this Court recently reiterated, "the Due Process Clause prohibits a State from punishing an individual without first providing that individual with 'an opportu-

nity to present every available defense.'" *Philip Morris USA* v. *Williams*, 549 U.S. 346, 353 (2007) (quoting *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972)). The right to introduce evidence in one's defense is required whenever a party's substantial rights are affected. But where a "reputation is at stake," the opportunity to be heard is "especially important." *Prudential Ins. Co.*, 278 F.3d at 191. Sanctions deprive a party of property but also "act as a symbolic statement about the * * * quality and integrity" of the party and its lawyers. *Ibid.* (internal quotation marks omitted).

Here, the Oklahoma courts punished HCA severely—directing a judgment against it on liability and labeling it a "perjur[er]"—without giving it more than an hour's notice, without allowing it to file a written response to the charges upon which the punishment was based, and without permitting it to introduce evidence in its defense. In short, the Oklahoma courts effectively permitted HCA to present *no* available defense, much less "every available defense," before imposing a massive deprivation of property.[11]

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[11] The Oklahoma Court of Civil Appeals stated that any lack of due process was cured by subsequent proceedings in which respondents sought additional monetary sanctions for the same alleged discovery violations and HCA was finally able to file a written response. App., *infra*, 55a. However, due process is required *before* the deprivation of property; even if the trial court had reconsidered its original decision to direct a verdict of liability—which it did not—later proceedings could not cure the constitutional defect: "A subsequent hearing to alter or amend the sanctions that have been previously imposed does not satisfy due process, or cure a previous due process violation." *Heal* v. *Heal*, 762 A.2d 463, 469 (R.I. 2000); accord *Dailey*, 141 F.3d at 229–230; *Tom Growney*, 834 F.2d at 836–837; *Textor* v. *Bd. of*

C. This Case Is An Excellent Vehicle For Providing The Lower Courts With The Necessary Guidance On This Important And Recurring Issue.

This case is an ideal vehicle for resolving the divisions in the lower courts regarding the procedural safeguards that must be provided to litigants before the imposition of severe sanctions. There can be no question that HCA squarely presented its due process objections—it challenged the adequacy of the notice that it received and requested the opportunity to file both a written response to the sanctions motion and to present evidence in its defense—only to be rebuffed at every turn. See App., *infra*, 75a, 101a. It raised these same issues on appeal (Brief in Chief of HCA at 6–12) and, after an unsatisfactory resolution by the Oklahoma Court of Civil Appeals, sought rehearing (Petition for Rehearing at 4–5). The Court of Civil Appeals, in its two opinions, squarely rejected HCA's due process arguments. App., *infra*, 7a–12a, 51a–58a. HCA then sought discretionary review on these issues in the Oklahoma Supreme Court (Petition for a Writ of Certiorari at 8–10), but that court denied review. App., *infra*, 64a.

Not only has the due process issue been presented and passed upon, but it clearly is an important one that recurs with great frequency. Motions for sanctions have become a regular feature of civil litigation. Indeed, while sanctions may once have been used mainly as a shield to protect litigants from recalcitrant refusals to comply with basic discovery obligations, they now much more often are used as a sword to provide a party with a strategic advantage.

Regents of N. Ill. Univ., 711 F.2d 1387, 1395 (7th Cir. 1983); see also *Armstrong*, 380 U.S. at 550–551.

The number and frequency of cases in which a plaintiff has sought an order barring a defendant from contesting liability, for example, have increased dramatically in recent years. See Jonathan J. Dunn & William J. King, *Discovery Sanctions as an Independent Case Strategy: An Alarming Trend in Litigation*, ABA FIDELITY & SURETY LAW COMM. NEWSLETTER, Winter 2002, at 17 ("[A] recent trend in litigation involves opposing counsel propounding discovery solely to obtain sanctions."). Given the stakes—millions or billions of dollars in liability and a serious blow to the reputations of the defendant and its counsel—it is imperative that adequate procedural safeguards be provided before the imposition of such a severe sanction.

The importance of the issue is well-illustrated by this case, in which the trial court directed a judgment of liability against HCA and then instructed the jury that HCA had committed perjury, without so much as permitting HCA to respond to respondents' allegations in writing or to introduce evidence in its defense. The ultimate outcome is an $18 million judgment that bears no relationship to the extent of the injury or the degree of reprehensibility of the underlying conduct. Further review is warranted to make clear that the Constitution requires much more before a party can be deprived of property in this way.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

CLYDE A. MUCHMORE
Crowe & Dunlevy
20 N. Broadway
Oklahoma City, OK 73102
(405) 235-7734

STEVEN J. RODOLF
LESLIE C. WEEKS
Rodolf & Todd
401 S. Boston Avenue
Tulsa, OK 74103
(918) 295-2100

EVAN M. TAGER
Counsel of Record
DAN HIMMELFARB
BRIAN D. NETTER
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioners

SEPTEMBER 2009

APPENDICES

APPENDIX A

May 9, 2008

IN THE COURT OF CIVIL APPEALS OF THE
STATE OF OKLAHOMA
DIVISION II

Case No. 104,093

NATHAN SHINN, a minor, by and through his parents, BRITTANY SHINN and BRANDON SHINN, and BRITTANY SHINN and BRANDON SHINN, individually
Plaintiffs/Appellees,

v.

HCA HEALTH SERVICES OF OKLAHOMA, INC., d/b/a OU MEDICAL CENTER d/b/a CHILDREN'S HOSPITAL; OU MEDICAL CENTER
Defendants/Appellants.

Appeal from the District Court of
Oklahoma County, Oklahoma

Honorable Barbara Swinton, Trial Judge

AFFIRMED

OPINION BY JOHN F. FISCHER, JUDGE:

Appellants seek review of a jury verdict awarding Appellees Nathan, Brittany and Brandon Shinn $9,000,000 in compensatory damages and $9,000,000

in punitive damages. Based on our review of the record on appeal and applicable law, we affirm.

BACKGROUND

On January 13, 2005, Nathan Shinn, a nine-month-old infant, was admitted to HCA Health Services of Oklahoma's Children's Hospital for treatment for injuries unrelated to this action. In the early morning hours Renny Jacob, the nurse assigned to the infant care unit, struck Nathan's head against a night stand while attempting to change his crib sheets. She did not immediately report the incident to anyone. The morning shift nurse performed a routine assessment of Nathan at 8:00 a.m., the following morning. Her assessment noted swelling and "sponginess" around Nathan's head. She did not order any tests or notify a doctor at this time. At 9:40 a.m. that morning, Nathan's father immediately noticed swelling and softness around Nathan's head and demanded a doctor. A subsequent CT scan revealed that Nathan had suffered multiple skull fractures and an intracranial hematoma.

Following the test, hospital staff notified the police and the Department of Human Services (DHS). The police began investigating the incident to determine precisely how Nathan's injuries had occurred. DHS began investigating the Shinns for suspected child neglect and abuse and interrogated each separately. A police officer was then constantly stationed by Nathan's room. The Shinns were under, police and DHS investigation for child abuse for the next twenty-four days.

Nurse Jacob initially lied about the incident to police. On January 16, 2005, she signed a sworn statement denying responsibility for Nathan's injury.

On February 2, 2005, the police again interviewed Nurse Jacob who, after being asked whether she would submit herself to a lie detector test, finally admitted to the police that she had caused Nathan's injuries.

The hospital did not inform the Shinns about Nurse Jacob's actions until five days later on February 7, 2005. On that day, the hospital's Chief Nursing Officer met with the Shinns and told them how Nathan had been injured. She assured them that the nurse responsible for Nathan's injuries would be "taken care of," but claimed that because the matter dealt with hospital personnel she could not specify what actions would be taken. Following this meeting, Nurse Jacob purportedly resigned from her position at the hospital. Her resignation was not documented in any of the personnel records offered at trial. On March 3, 2005, DHS sent a letter to the Shinns to inform them that it had closed the investigation on Nathan Shinn, concluding that the Shinns had no part in Nathan's injuries.

The Shinns filed this suit against HCA Health Services of Oklahoma, Inc. (HCA) in July 2005 seeking compensatory and punitive damages for Nathan's injuries and pain and suffering, their own pain and suffering and for an alleged cover-up of the incident by HCA. What followed was a bitter and protracted pretrial discovery process wherein attorneys for HCA continually delayed compliance with the Shinns' discovery requests making their last, but still incomplete, response three days prior to the October 31, 2006, jury trial.

The Shinns served their initial discovery requests on August 14, 2005. In its response to the Shinns' document request, dated November 29, 2005,

HCA produced no documents and objected to all but five of the Shinns' requests, claiming that the remaining requests were overbroad, burdensome, irrelevant, protected by various privileges or pertained to documents that did not exist. The few requests to which HCA was at all responsive were deficient in quality as well. For example, in response to the Shinns' request for "policies and regulations governing the standard of care for incidents that result in injuries to a patient at the hospital," HCA offered to "make available for inspection at the offices of [counsel] the Table of Contents of the relevant nursing unit." The Shinns' counsel conveyed their dissatisfaction with HCA's responses to their discovery requests on numerous occasions. When asked whether or not the documents to be made available in opposing counsel's office could simply be faxed to the Shinns' counsel, HCA stated that it would do so but failed to fax the documents. Following numerous phone calls and letters, HCA supplemented its response on March 27, 2005. Rather than offer more documents or responses to the Shinns' request, however, the supplemental response merely offered four new objections.

HCA's non-compliance throughout the discovery process was not confined to the production of documents. The same pattern of obstructive non-compliance is evident throughout the record with regard to requests for admissions, interrogatories and even the production of witnesses for depositions. HCA sought numerous continuances. Eventually, the Shinns filed a motion to compel production of documents. In response, HCA moved to strike the motion but never responded to the Shinns' original motion to compel. On August 25, 2006, the Trial Court granted the Shinns' motion to compel and ordered complete

and full responses from HCA within one week. HCA subsequently refused to sign the Journal Entry memorializing the Trial Court's order and failed to respond to the discovery requests as ordered by the Trial Court. The Shinns then filed a motion for sanctions asserting HCA's failure to comply with the Trial Court's discovery orders. Seven days later, on the Friday afternoon three days prior to trial, HCA delivered to the Shinns' attorney's office a box of 735 pages of documents, an affidavit and a privilege log. Although the box contained some of the requested documents, the production was still largely deficient. In response, the Shinns filed a supplemental motion for sanctions the following Monday, citing HCA's egregious disregard for the Trial Court's order, obstructive tactics and spoliation of evidence. In their motion, the Shinns requested a judgment on liability and punitive damages.

Following a hearing the morning of trial, the Trial Court granted judgment on liability, but denied the request as to punitive damages. At the conclusion of the compensatory damages phase of trial, the jury returned a verdict in favor of the Shinns for $9,000,000. The award represents a general verdict of $4 million to Brittany and Brandon Shinn and $5 million to Nathan Shinn for actual damages. The jury also found that HCA had acted with reckless disregard toward others and intentionally and with malice toward others. Following the punitive damages phase of trial, the jury awarded the Shinns $9,000,000 in punitive damages. HCA raises six issues on appeal, which we address below.

STANDARD OF REVIEW

The imposition of sanctions is reviewed for an abuse of discretion. *Hammonds v. Osteopathic Hosp.*

Founders Ass'n, 1996 OK 100, ¶ 116, 934 P.2d 319, 322. "If the trial court's decision stands supported by the record and reason, it will not be disturbed on review." Id. Proceedings to impose sanctions are of equitable cognizance, and an award of sanctions will be presumed legally correct "unless found to be clearly contrary to the weight of the evidence or to some governing principle of law." *Warner v. Hillcrest Med. Ctr.*, 1995 OK CIV APP 123, ¶ 49, 914 P.2d 1060, 1072.

"[A] general verdict of a jury constitutes a finding of every material fact necessary to support it, and is conclusive as to all disputed facts and conflicting statements." *Grumman Credit Corp. v. Rivair Flying Serv. Inc.*, 1992 OK 133, ¶ 10, 845 P.2d 182, 185. On appeal, we will not disturb a jury verdict if it is supported by any competent evidence reasonably tending to support the verdict. *Florafax Int'l, Inc. v. GTE Mkt. Res., Inc.*, 1997 OK 7, ¶ 3, 933 P.2d 282, 287. "Where (1) there is any competent evidence which reasonably supports the jury's verdict and (2) there are no prejudicial errors shown in the trial court's jury instructions, neither the verdict nor the judgment based thereon will be disturbed on review." *Stroud v. Arthur Andersen & Co.*, 2001 OK 76, ¶ 9, 37 P.3d 783, 787-88.

"The standard of review of challenged instructions is whether there is a probability that the jurors were misled and thereby reached a different result than they would have reached but for the error." *Smicklas v. Spitz*, 1992 OK 145, ¶ 14, 846 P.2d 362, 368. Moreover, we will not set aside a judgment on the ground of misdirection of the jury absent a finding that the error complained of either has probably resulted in a miscarriage of justice or constituted a

substantial violation of a constitutional or statutory right. 20 O.S.2001 § 3001.1. Further, we will not reverse a judgment based on misconduct of counsel absent a showing that counsel's conduct substantially prejudiced the jury "to the material detriment of the party complaining." *Oklahoma Turnpike Auth. v. Daniel*, 1965 OK 7, ¶ 13, 398 P.2d 515, 518.

DISCUSSION[1]

I. Discovery Sanctions[2]

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[1] On July 25, 2007, HCA filed its notice of supplemental authority with this Court. We note that although the filing is titled as a notice of supplemental authority, the substance of the filing attempts to raise issues not raised in HCA's brief in chief to this Court. "Assignments of error which are not argued or supported by the brief with citations to authority will be considered and treated as waived by this Court." *Peters v. Golden Oil Co.*, 1979 OK 123,¶ 3, 600 P.2d 330, 331.

[2] On December 22, 2006, the Shinns filed a Motion To Strike Materials Improperly Designated By Appellants For The Record On Appeal. The Shinns contend that HCA attempted to designate several documents in the record on appeal that were not before the Trial Court at the time of the decision appealed. Specifically, they complain of documents that were filed of record subsequent to the conclusion of trial on November 3, 2006. The Shinns' motion also requests that this Court strike several subpoenas, summonses and notices of depositions designated by HCA on appeal. Supreme Court Rule 1.28(b), 12 O.S., ch. 15, app. 1., provides, in part:

> The record on appeal shall not include the following unless upon order of the trial court or appellate court, or unless the document is specifically drawn in issue by the appeal: subpoenas, summonses, certificates of service, returns and acceptances of service, and procedural motions or orders (e.g. continuances, extensions of time, etc.). . . . Materials which were not before the trial court at the time of the decision appealed are not properly part of the record on appeal without order of the trial court or the appellate court.

In its first allegation of error, HCA contends that the Trial Court abused its discretion by directing a verdict on liability in favor of the Shinns as a sanction against HCA for its failure to comply with discovery requests. Title 12 O.S. Supp. 2002 § 3237(B)(2)(c) provides that where a party fails to obey an order to provide discovery, the Trial Court may, as a permissible sanction, enter an order "rendering a judgment by default against the disobedient party."

In support of its proposition, HCA directs this Court's attention to *Payne v. Dewitt*, 1999 OK 93, 995 P.2d 1088. The *Payne* Court was confronted with a defendant who failed to appear for a "noticed deposition" after numerous attempts were made by opposing counsel to depose him. As a sanction, the trial court in *Payne* entered a default judgment against the defendant for actual and punitive damages. Before affirming this sanction as proper, the *Payne* Court noted a five-factor test employed by the U.S. Court of Appeals for the Tenth Circuit in similar contexts. *See Jones v. Thompson*, 996 F.2d 261, 264 (10th Cir. 1993); *Ehrenhaus v. Reynolds*, 965 F.2d 916, 920-21 (10th Cir. 1992). These five factors are: (1) the quantum of prejudice noncompliance has caused the adversary (or moving) party, (2) the extent of interference with the judicial process, (3) culpability of the litigant, (4) whether the court warned the party in advance that noncompliance could lead to dismissal or default judgment, and (5) the efficacy of lesser sanctions. *Payne*, 1999 OK 93 at ¶ 8, 995 P.2d at 1093.

As no order of the Trial Court or this Court requesting designation of these documents exist, we grant the motion to strike the challenged documents from the record on appeal.

In considering the first factor, the Trial Court noted that prejudice caused by HCA's noncompliance was evidenced by HCA's repeated failure to comply with discovery requests, even after being ordered to do so by the Trial Court, for more than a year. Further, HCA's failure to comply with discovery in any material way until three days prior to trial impeded the Shinns' ability to prepare for trial.

As to the second factor, the Trial Court's own admonitions to counsel for HCA more than support our affirmance:

> I attempted to be very clear in what my expectations were of the defendants with the volume of information that had not been responded to [and that] I felt was relevant and ruled was relevant . to not have affidavits from the litigant as requested stating whether or not there were documents seems to be inexcusable in my mind.
>
> The delay tactics on the part of the defendant have been well established in asking for continuances and delaying responding and hoping that the Motion to Disqualify the trial judge would get them the continuance they previously sought did not work out and I think that may have played [a] part in the failure to provide the necessary documents in this case for the plaintiffs to be properly prepared.

The uniform pattern of HCA's failure to respond to legitimate requests throughout the discovery process clearly supports the Trial Court's finding that this conduct unnecessarily obstructed the judicial process.

The next factor, the culpability of the litigant, is also clearly supported by reason and evidence. HCA willfully and recklessly disregarded the Trial Court's direct orders. HCA's first "material" attempt at responding to the Shinns' discovery requests came fourteen months after the initial request for production of documents was served. At best, HCA failed to honor the discovery process until three days before trial, which the Trial Court found to be an attempt to force the Shinns to request a continuance. HCA's culpability in this regard is undeniable.

On appeal, HCA contends that the Trial Court's sanction constitutes an abuse of its discretion with regard to the fourth factor – i.e., whether the Trial Court warned HCA that its noncompliance could lead to a default judgment. HCA contends that the Trial Court abused its discretion because it failed to explicitly warn counsel that a default judgment was a possible sanction for its noncompliance. The record lacks any explicit evidence that such notice was given.

However, HCA does not argue that the Trial Court's sanction constitutes error because it was unaware of the possibility of a default judgment. Rather, it argues that the Trial Court abused its discretion because *Payne* required the Trial Court to warn that default judgment as to liability was a sanction that was possible in this instance, prior to imposing that sanction. A cursory reading of *Payne* rebuts the imposition of such a duty on the Trial Court. In *Payne*, the defendant on whom the sanction of a directed verdict was imposed was held to have been given sufficient notice because he "was warned through his counsel that default would follow if he failed to appear at the court-ordered deposition."

1999 OK 93 at ¶ 10, 995 P.2d at 1094. Thus *Payne* simply requires that a litigant on whom the discovery sanction of a directed verdict is imposed be warned by any source, including the litigant's own counsel. The record before this Court clearly establishes, beyond any doubt, that counsel for HCA was well aware of the possibility of such a sanction; its July 20, 2006, motion for sanctions filed in response to the Shinns' alleged failure to comply with discovery requests filed July 20, 2006, states: "WHEREFORE, premises considered, Defendant HCA . . . respectfully requests this Court dismiss this case as a sanction for Plaintiff's failure to follow the Court's [scheduling order]."

In this context, affirmative notice from the Trial Court informing HCA of the possibility of a directed verdict was unnecessary because the record clearly demonstrates that counsel for HCA was aware of, and indeed asked for, a similar discovery sanction. Given the language of HCA's own pleading, evidencing its clear awareness of the possibility of judgment by default as a sanction available pursuant to 12 O.S. Supp. 2002 § 3237(B)(2)(c), we cannot say that the Trial Court abused its discretion in determining that HCA had sufficient notice of the sanction ultimately imposed.

In considering the efficacy of lesser sanctions, the Trial Court noted that any lesser sanction of striking certain documents would only assist HCA and would further "hand-tie" the Shinns in trying the case in a timely manner. Finally, the Trial Court determined that any continuance of the proceedings would only reward HCA's delay tactics with further delay. Based on this record, we cannot say that the Trial Court abused its discretion in directing a verdict on liabil-

ity as an appropriate sanction for HCA's continued failure to comply with its explicit orders. Further, we note that HCA's underlying liability for the injuries suffered by the Shinns was admitted prior to trial and the essential facts supporting the Trial Court's directed verdict are not in dispute. Finally, we observe that the Trial Court's sanction order was entered prior to any determination by the jury as to the amount of damages to be awarded in this case.

II. Jury Instructions

At the conclusion of trial, the Trial Court gave the following instruction:

> You are instructed that Defendant has conducted itself in violation of the laws of the State of Oklahoma. This conduct has occurred in my Courtroom. This conduct includes a violation of the laws of the State of Oklahoma, as to perjury and disobedience of a direct Court order. You may consider the Defendant's perjury and direct disobedience of a Court order in your consideration of punitive damages for Plaintiffs.
>
> You are to consider these findings of the Court, in addition to the evidence presented, in determining whether Defendant acted in reckless disregard of the rights of others or intentionally and with malice towards others, when you consider punitive damages against Defendant in a later part of this trial. If you find that Defendant did not act in reckless disregard of the rights of others, or intentionally and with malice towards others, you may not award punitive damages against Defendant.

HCA contends that this instruction constitutes prejudicial error because it impermissibly impeached the credibility of HCA's witnesses and counsel. *See Sawyer v. Brown*, 1925 OK 377,¶ 2, 236 P. 404, 405. As we have already noted, we will not reverse a jury's verdict based on an allegedly prejudicial instruction absent a showing that the jurors were misled and "reached a different result than they would have reached but for the error." *Smicklas*, 1992 OK 145 at ¶ 14, 846 P.2d at 368. The record is replete with evidence supportive of the Trial Court's instruction based on HCA's lack of candor. In addition to HCA's previously discussed violation of a direct court order, we emphasize two specific incidents of gross misconduct merely to illustrate the tenor of HCA's egregious and questionable behavior throughout litigation.

First, the Shinns' original request for production of documents included a request for "[c]olor copies of all medical records, photographs, videotapes, and other records and documents relating to Nathan Shinn while he was a patient at The Children's Hospital." In response, HCA provided black and white copies and contended before the Trial Court, as late as October 27, 2006, that "the original medical records were scanned and saved to a computer. As such the hard copies of the original records are no longer available and the only copies available are in black and white." On the first day of trial less than a week later, the Shinns subpoenaed Jindria Alvarado, Health Information Management Manager for the hospital, and demanded that she either produce the records or explain the process by which they had been destroyed. Alvarado arrived in court with the original medical records and testified that the original documents had not been destroyed and were cur-

rently in the hospital's control. She further testified that she was never notified that the Shinn's attorneys had requested color copies of the original files. In a hearing outside the presence of the jury, the Trial Court once again admonished HCA's counsel for his misstatements, sequestered the medical records in chambers for review by the Shinns' attorney and reserved consideration of the complained of instruction on punitive damages until all evidence had been presented.

Second, evidence in the record clearly establishes that HCA was well aware of the cause of Nathan's injury as early as February 2, 2005. At trial, witnesses for HCA testified that the Shinns were invited to the hospital where they were informed of Nurse Jacob's culpability and offered an apology that same week. Despite awareness of these facts, in an answer filed September 26, 2005, HCA denied that it caused the injury or that any of its employees were negligent in the care and treatment provided to Nathan, contending that it was without sufficient knowledge to form a belief as to whether or not Nathan's injuries were directly caused by the acts or omissions of its agents or employees.

The Trial Court was justifiably troubled by HCA's lack of candor throughout these proceedings. The record supporting the Trial Court's instruction is robust. However, the instruction merely notes that the jury may consider HCA's obstructive conduct during litigation as well as its, at best, misleading conduct prior to the filing of this suit in determining whether to award punitive damages.

HCA also contends that this instruction necessitates reversal because the Trial Court's finding of "perjury" was prejudicial and unsupported by the re-

cord. Once again we note that our standard of review necessitates affirmance of a Trial Court's jury instruction absent a showing that the instruction misled the jurors. The substance of the instruction, i.e., that HCA disobeyed a direct court order and that it had falsely asserted that evidence had been destroyed, was predicated on verifiable fact. HCA has not shown that the term "perjury," used to describe HCA's lack of candor, misled the jury.

Finally, HCA contends that the Trial Court prejudiced the jury by allowing three separate instructions regarding the hospital's duty, corporate negligence and chain of command, because they were not contained in the Oklahoma Uniform Jury Instructions (OUJI). HCA asserts that these instructions were repetitive with respect to liability and reinforced the Trial Court's directed verdict. "The cumulative effect of those erroneous and highly prejudicial instructions," HCA contends, "cannot be overlooked." The jury was certainly aware that the Trial Court had directed a verdict finding HCA liable for Nathan's injuries. We do not perceive how informing the jury of this, or even reminding the jury of the same on more than one occasion, would cause them to render a verdict it would not have otherwise rendered. Therefore, we hold that the instruction does not constitute reversible error.

III. Evidence of HCA's Net Worth

HCA next alleges that the Trial Court erred by allowing evidence of its parent corporation's financial worth during the punitive damages phase of trial because the Trial Court lacked sufficient foundation to admit the evidence. Some discussion of the events leading up to the admission of these documents is

necessary to give context to HCA's allegation of error.

On October 30, 2006, after announcing its discovery sanction, the Trial Court ordered HCA to produce financial records for use in the punitive damages phase of trial. On November 2, 2006, outside the presence of the jury, HCA offered a one-page summary of the audited financial records for the hospital for the year 2005. HCA did not offer any tax returns or financial information regarding any of its other facilities or the hospital's parent company. Counsel for the Shinns responded that the proffered evidence was not sufficient and explicitly requested HCA's tax returns for the last three years. Counsel for HCA stated to the Trial Court that he was unaware of where that data would be housed, but that he would "find out."

The Shinns promptly subpoenaed HCA's accounting firm for the requested financial records and filed a trial memorandum on November 2, 2006, in which they contended that HCA was merely an alter-ego of its parent corporation Hospital Corporation of America, Inc. (HCAI). At the conclusion of the compensatory damages phase of trial, the Shinns once again requested HCA's tax returns. HCA again produced the same one-sheet summary, stating that tax returns could not be supplied because HCA "does not have its own financials" for the hospital or any of its other enterprises, and that the requested tax returns did not exist because HCA did not file its own tax returns.[3] At no point throughout the entire proceedings

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[3] On appeal, HCA asserts that the summaries for the hospital accurately depict HCA's financial worth because the hospital is the only facility operated by HCA. HCA makes this dubious ar-

did HCA provide the requested documents. Based on the wholly deficient tenor of HCA's financial summary and the alleged alter-ego status of HCA, the Shinns argued that the financial records for HCAI were admissible to give an accurate financial picture of the defendant's assets.[4]

On November 3, 2006, the Trial Court granted the Shinns' request to amend their pleadings to conform to the evidence presented at trial pursuant to 12 O.S.2001 § 2015. The Trial Court then admitted HCA's annual financial report and SEC filings obtained from the interne. Counsel for HCA argued that the records were inadmissible because HCAI was not a named defendant and HCA was an "indi-

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gument despite testimony from HCA's Chief Nursing Officer that she was in charge of three separate facilities for HCA. On appeal, HCA contends that, "as a nurse," she was not qualified to speak about the operation of other facilities. Her assertions of fact appear to be accurate based on the record and her experience as HCA's Chief Nursing Officer. Further, HCA never objected to the Chief Nursing Officer's testimony with regard to these facts at trial, and its complaints of error will not be considered for the first time on appeal. 12 O.S.2001 § 2104.

[4] On appeal, HCA argues that "Plaintiffs falsely suggested to the Court that it had submitted a document request for the 10K of [HCAI]." We have thoroughly reviewed the record on appeal and find HCA's accusation of falsehood to be wholly unsupported by the record. At no point did the Shinns suggest to the Trial Court, either orally or in a written pleading, that they had previously requested from HCA the document introduced at trial. Rather, the Shinns accurately stated to the Trial Court that they had requested financial records and tax returns from HCA to no avail. In response to HCA's failure to comply with the Trial Court's order to provide the same, the Shinns offered the only document available to them on such short notice. We note that HCA's blatant mischaracterization of the Shinns' conduct is deficient in its candor to this tribunal consistent with its conduct in the Trial Court.

rect subsidiary" of HCAI rather than an alter-ego or wholly owned subsidiary. In *Frazier v. Bryan Mem'l Hosp. Auth.*, the Oklahoma Supreme Court held:

> The question whether an allegedly dominant corporation may be held liable for a subservient entity's tort hinges primarily on control. Factors which may be considered at trial include whether 1) the parent corporation owns all or most of the subsidiary's stock, 2) the corporations have common directors or officers, 3) the parent provides financing to its subsidiary, 4) the dominant corporation subscribes to all the other's stock, 5) the subordinate corporation is grossly undercapitalized, 6) the parent pays the salaries, expenses or losses of the subsidiary, 7) almost all of the subsidiary's business is with the parent or the assets of the former were conveyed from the latter, 8) the parent refers to its subsidiary as a division or department, 9) the subsidiary's officers or directors follow directions from the parent corporation and 10) legal formalities for keeping the entities separate and independent are observed.

1989 OK 73, ¶ 17, 775 P.2d 281, 288 (footnotes omitted).

In support of their contention that HCA was merely an alter-ego of HCAI, the Shinns offered evidence to show: (1) the hospital's employees are subject to HCAI's employee conduct and patient care policies; (2) the Federation of American Hospitals lists the hospital, as well as the other facilities operated by HCA, as a facility of HCAI; (3) HCAI's web site lists the hospital as one of "our family of hospitals and surgery centers;" (4) HCAI nurse recruit-

ment literature proposes a "career at HCAI" and advises potential recruits that they can be relocated throughout the country to any of HCAI's 400 facilities in 23 states; (5) HCAI established a "company-wide initiative to create a culture of patient safety" to implement patient safety practices in its hospitals throughout the country; (6) all HCAI-affiliated hospitals utilize HCAI-authored safety programs; (7) HCAI's press packet contains a map of "[HCAI] Locations" that includes the hospital; (8) HCAI enforces a mandatory code of conduct in all of its hospitals, including the hospital; (9) HCAI retains the right to institute disciplinary action against any employee or facility in violation of the mandatory code of conduct; (10) HCAI operates an ethics hotline that local facilities may contact for assistance in resolving issues of patient safety, as well as a joint commission to which employees of local facilities may report issues of concern "if the reporting individual doubts that the issue has been given sufficient or appropriate attention" by a local facility's management; (11) HCAI directs and mandates the information available to patients at a local facility; (12) HCAI directs and controls how patient information is to be handled and how emergency treatment is to be conducted; (13) HCAI employs a "Corporate Ethics and Compliance Officer" to whom violations of the law or company policies can be reported to ensure compliance; (14) HCAI maintained an Internal Audit Department to monitor Code compliance at the hospital; (15) HCAI dictates procedures for the maintenance of business document accuracy, retention and disposal for the hospital; (16) HCAI implemented policies, procedures and systems to facilitate accurate billing to government payers, commercial insurance payers, and patients for the hospital; (17) HCAI controls the billing and

coding procedures for the hospital; (18) HCAI controls dissemination of hospital business records; (19) HCAI controls the hospital communications systems, financial reporting and cost records; (20) HCAI has the authority to discipline hospital employees who abuse the communications system; (21) HCAI requires all hospital employees to sign an acknowledgment, which recognizes HCAI's right to any authorship or invention created during employment; (22) HCAI's annual and quarterly reports include the income, assets, profits, losses and expenses of the hospital; (23) all HCAI facilities and affiliates are insured through a subsidiary of HCAI; (24) the hospital staff are eligible for stock options in HCAI; (25) the assets of the hospital are leased to HCAI; (26) five representatives of HCAI sit on the hospital's ten-member governing board; (27) the hospital was initially capitalized by a $40 million dollar contribution from HCAI; (28) HCAI continues to advance amounts to fund capital expenditures; (29) HCAI makes distributions and disbursements on behalf of the hospital for operating expenses and capital transactions; and (30) workers' compensation for the hospital staff is pooled with all other HCAI affiliates. HCA never called any witnesses or offered any evidence to dispute this evidence.

Nonetheless, HCA argues, "Plaintiffs wrongly used [HCAI's] net worth, even though the theory of alter ego was never litigated or decided on the merits." A cursory review of the record establishes that the Shinns filed an extensive memorandum arguing the alter ego theory to the Trial Court, the Trial Court conformed the pleadings to include the evidence of an alter ego, and HCA failed to present any evidence to refute the Shinns' contention. Given HCA's continued delay in discovery, the extensive

evidence of control by HCAI submitted by the Shinns and the absence of any evidence to controvert the Shinns' claims, the only evidence of record establishes that HCA was an alter ego of HCAI and, consequently, the Trial Court did not err in permitting the jury to consider evidence of HCAI's financial worth in formulating an appropriate punitive damages award.

IV. Statements of Counsel

HCA next contends that the Trial Court committed reversible error by allowing the Shinns to inform the jury, during the punitive damages phase of trial, that HCA's compensatory damages obligation would be satisfied by liability insurance. "[O]rdinarily any reference that injects the insurance feature ... is improper and prejudicial to the rights of the defendant and failure to declare a mistrial upon timely motion constitutes reversible error." *Smith v. Hanewinckel*, 1965 OK 113, ¶ 22, 405 P.2d 99, 103 (quoting *M & P Stores, Inc. v. Taylor*, 1958 OK 123, 326 P.2d 804). "[W]hether or not testimony is prejudicial and effectually informs the jury that defendant is protected against a judgment by insurance, depends essentially upon the facts and circumstances of each case." *M & P Stores*, 1958 OK 123 at ¶ 16, 326 P.2d at 808. However:

> If counsel for one party pursues a line of argument not called for by the facts of the case and in itself improper and thereby invites a reply, the party so, through counsel, violating a proper course of procedure and the rules intended to secure the proper presentation of causes ought not to be heard to complain of the reply.

Helmerich & Payne v. Nunley, 1935 OK 633, ¶ 41, 54 P.2d 1088, 1095 (quoting *Taylor County v. Olds*, 67 S.W.2d 1102, 1106 (Tex. App. 1934)).

As in *M & P Stores*, our holding today is entirely dependent on the facts surrounding the discussion of HCA's liability insurance coverage. In his closing argument following the punitive damages phase of trial, counsel for HCA told the jury that HCA had already been "punished" enough by the compensatory damages award and that the hospital was a "facility that spends the vast majority of its time taking care of people who can't get care anywhere else." He further stated that by "punishing this defendant any further" the jurors "may wind up punishing [themselves] because of the care that is available there that's not available anywhere else." Immediately thereafter in a bench conference held outside the presence of the jury, the Shinns' attorney argued that by suggesting that any further punishment might unduly diminish the resources of the hospital such that it could no longer provide care, HCA had "opened the door" to present contradictory evidence that HCA's resources would not be depleted by the initial compensatory damages award, which was covered by HCA's liability insurance policy.

In this instance, HCA's suggestion that a punitive damages award in addition to the compensatory damages verdict would further tax its resources "opened the door." Therefore, discussion of HCA's liability insurance coverage was not only proper, but necessitated and provoked by HCA's closing argument. Further, to the extent HCA could show any improper argument by counsel for the Shinns, as stated otherwise in *Helmerich*,"[C]ounsel for defendant was more guilty of improper argument than

was counsel for plaintiff." 1935 OK 633 at ¶ 40, 54 P.2d at 1095. Consequently, we hold that the Trial Court did not commit error by permitting the Shinns to make statements concerning HCA's liability insurance coverage to the jury.

V. Evidence in Support of Jury Verdict

HCA asserts that the jury's award of $9 million in actual damages was not supported by the evidence. Specifically, HCA contends that no testimony was offered establishing that Nathan would suffer lasting physical damage and that none of the evidence presented supports an award for the Shinns' emotional damage. In response, the Shinns argue that HCA has failed to preserve for appeal any objection based on the sufficiency of the evidence and that, regardless, evidence presented at trial was sufficient to support the jury's verdict.

Ordinarily, the issue of the insufficiency of the evidence presented at trial "may not be raised on appeal where there has been no demurrer to the evidence, motion for a directed verdict or other effort to raise the sufficiency issue in trial court." *John Deere Co. v. Payne*, 1979 OK CIV APP 8, ¶ 2, 592 P.2d 544, 545. HCA does not dispute that it failed to either demurrer to the evidence or move for a directed verdict. Rather, it contends that such a motion was unnecessary in light of the Trial Court's directed verdict because "the notion of a 'motion for a directed verdict' is clearly inapplicable where there is no jury whose verdict one may direct." *Id.* at ¶ 3, 592 P.2d at 545. However, the Trial Court's directed verdict against HCA as to liability is not relevant to the issue of damages. The jury was not directed by the Trial Court to award a specific amount. Rather, the

jury rendered a verdict based on the evidence adduced at trial.

HCA directs this Court's attention to *Barnes v. Oklahoma Farm Bureau Mut. Ins. Co.*, in which the Oklahoma Supreme Court held that pursuant to 12 O.S.2001 § 991 "there was no requirement the [contested] issue be made the subject of a motion for new trial or remittitur in order to preserve it for appellate review." 2000 OK 55, ¶ 37, 11 P.3d 162, 176. Noting that the defendant had demurred to the plaintiff's evidence, moved for a directed verdict and objected to lifting the cap on punitive damages, the *Barnes* Court was satisfied that the defendant had preserved the issue of sufficiency for appeal because it had consistently raised the issue of sufficiency to the trial court. Unlike the defendant in Barnes, HCA did not demurr to the evidence or move for a directed verdict or attempt to raise the issue of sufficiency to the Trial Court at any point in the proceedings below.

By neglecting to file a motion for a directed verdict, HCA has failed to preserve the error for review. *Richardson v. Butler*, 1952 OK 26, ¶ 13, 240 P.2d 1058, 1060; *Drouillard v. Jensen Constr. Co.*, 1979 OK 126, ¶ 5, 601 P.2d 92, 93. As such, HCA's failure to request a directed verdict in this instance is fatal to this issue on appeal. *Bane v. Anderson, Bryant & Co.*, 1989 OK 140, ¶ 33, 786 P.2d 1230, 1236 (claims of excessive damages can not be considered for the first time on appeal).[5]

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[5] Although we ultimately find that HCA has failed to preserve the issue of sufficiency on appeal, we are confident that the jury's award is supported by competent evidence as demonstrated by the record on appeal.

The jury's award of $9 million represents a general verdict of $4 million dollars to Brittany and Brandon Shinn and $5 million dollars to Nathan Shinn for actual damages. Although HCA correctly states that the Shinns "presented no medical evidence that the head injury caused any lasting damage to Nathan," the jury's verdict did not specify that the damages awarded were due solely to any lasting injury to Nathan. The uncontroverted testimony of all witnesses who testified at trial established that Nathan suffered a bilateral fracture of the skull as well as a subdural hematoma. The record further establishes that the nurse who caused the injury returned Nathan to his bed and failed to report his injury to anyone. Consequently, Nathan's injuries remained untreated for the next seven hours and ultimately required further medical care. Therefore, competent evidence exists to support the jury's award of actual damages despite the position urged by HCA - i.e., that the extent of Nathan's injuries and the fact that he was untreated for seven hours were not sufficient evidence of pain and suffering to support the jury's verdict absent evidence of any lasting physical injury.

HCA contends that the award to Brandon and Brittany Shinn was "larger than reason dictates" because: (1) they did not seek counseling; (2) they were only "two of many people interviewed" by the police; (3) Nathan was never removed from their custody; and (4) "[t]he combined impact of [HCA's] alleged actions and counsel's argument similarly 'influenced the jury to create an improper sympathetic response.'"

The bulk of evidence submitted at trial spoke to an alleged coverup by HCA that extended from the moment the Nurse Jacob's actions became known all the way through trial. In addition to the robust record of misconduct discussed above, we note several other troubling incidents supportive of the jury's verdict.

As noted above, following the CT scan, which revealed the extent of Nathan's injuries, DHS and the police began investigating the Shinns for suspected child abuse. Police officers were stationed at Nathan's room during the investigation, which lasted for some twenty-four days. Without question, the Shinns' trauma and stress of discovering that their infant child had suffered a severe head injury was only amplified by the subse-

quent police investigation. The record clearly establishes that, but for the Nurse Jacob's failure to confess her role in Nathan's injuries, these investigations would not have taken place. Further, the hospital made no attempt to inform DHS of the incident. Offering his testimony via affidavit submitted at trial, the DHS . investigator assigned to Nathan's case stated that, up until that day - some twenty-two months after the injury - DHS was unaware that any employee of the hospital had caused Nathan's injuries.

When police were initially called to the hospital to investigate, the doctor reviewing Nathan's test results stated to police that the injury was suspicious and indicated non-accidental trauma. At trial, a sergeant from the police department testified that the department had recommended that the district attorney press charges against the nurse responsible for Nathan's injuries. We find the following exchange informative:

> Q: Everything you've heard about [the incident] during your investigation is about as bad an act as you can see, isn't it?
>
> A: Yes.
>
> Q: And you told us about that the DA, the charges were recommended against this nurse at the hospital.
>
> A: The LPN, yes.
>
> Q: And, in fact, even to this day your Major Welch and Captain Ligon still believe that those charges should be pursued, don't they?
>
> A: Yes.
>
> Q: [Do] [y]ou believe that?
>
> A: Yes.
>
> Q: And you're disappointed that they weren't?
>
> A: Yes.
>
> Q: And at one point you mentioned that the reason they weren't is because of a Dr. Stuemky [who] made a recommendation that it was an accident; is that right?
>
> A: Correct.
>
> Q: Who is Dr. Stuemky?

A: I believe Dr. Stuemky, he's the -- he's senior physician for the [hospital], deals primarily with children's pediatric and is used as the State's witness for child abuse cases.

Q: And it was based on that recommendation?

A: That's what it said on the declined sheet.

As previously discussed, when the Shinns were first told of Nurse Jacob's actions, they were also assured that she would be "taken care of." HCA maintained that they could not disclose whether she had been fired because to do so would be a violation of personnel confidentiality. In a deposition taken prior to trial, HCA's Associate Chief Nursing Officer stated three separate times that she had fired the nurse. At trial, the nurse testified that she had resigned after HCA offered her the choice between resigning or being fired. She further testified that in March 2006 she had upgraded her license from an LPN to a Registered Nurse and had received a commensurate raise in pay from her current employer. She had, since the incident, obtained gainful employment at other medical facilities in Oklahoma City, including one that specializes in adolescent child care for special needs children. Despite HCA's employment practice to the contrary, Nurse Jacob's personnel records are silent with regard to her termination or resignation. HCA's Associate Chief Nursing Officer further testified that nothing in the nurse's personnel file would inform a potential employer of her actions with regard to Nathan Shinn or her subsequent resignation. Relevant portions of the transcript provide:

Q: Is there anything in her personnel file, her employment file that shows that she is not re-hireable?

A: Not in this personnel file. . . .

Q: Is there anything in the personnel file, the employment file that was produced to us last Friday that will show us any of the events, the meeting, the telephone conference, the decision to let her resign or quit rather than fire, anything in there that we can look at back then?

A: No.

. . . Q. . . . [I]f we're going to go back and, again, this actions - words versus actions, can you point us out anything back at that time that we could look at, ma'am?

A: The end of her employment.

Q: All right. Where do we go to look at that?

A: To know when the last day that she worked was.

Q: All right. Is there anything in her personnel file?

A: No.

Q: Where else do we go then?

A: (No response.)

. . . Q: Did you tell me during that, I think it was 100-page deposition, a single time that you let her resign rather than firing her?

A: No . . .

HCA's eleventh-hour discovery response contained the Nurse Jacob's personnel file, as well as the files for two other nurses. The response was disorganized. At trial, the Shinns offered this as evidence of further obfuscation by HCA. Notably, relevant documentation of Nurse Jacob's performance history was placed in the file of another nurse. Among these "misplaced" performance reports was a December 16, 2003, individual action plan, which stated, "The summary findings for the individual assessed are: DOES NOT MEET EXPECTATIONS . . . [c]ommunicate findings ASAP to manager to determine readiness for assignment as LPN on the Infant Unit evening/night shift." Also misplaced in this file was a January 23, 2004, reassessment individual action plan, which provided, "Management of events is limited. Omits CMS check on the extremity of a five-year-old with an IV infiltrate. Omits stabilization of C-spine and calling, notifying RN for the infant found on floor after hearing a thump and begins CPR." Comments in the "Management of Problems" section of the plan provide that Nurse Jacob "[d]oes not consistently report all essential data to the RN to report to the MD ... does not consistently take the nursing actions expected for role."

At trial, HCA's Chief Nursing Officer testified that the Oklahoma Board of Nursing (the Board) was the appropriate regulatory authority to which Nurse Jacob should have been reported for her actions. She further testified that based on the current state of the records no regulatory agency, accreditation agency, Medicare or Medicaid - organizations on which HCA relies for

the receipt of benefits and accreditation - would have reason to know of her behavior or what happened with regard to Nathan Shinn. HCA's Associate Chief Nursing Officer testified that HCA had reported the nurse to the Board. According to HCA, her testimony in this regard was "unwavering." In a previous deposition, the Associate Chief Nursing Officer testified that the report to the Board had been filed online and, consequently, physical evidence of this report did not exist.

Despite HCA's insistence that it had reported Jacob to the Board, an overwhelming amount of evidence in this record suggests otherwise. First, Jacob testified that she had never been contacted by the Board for an investigation. Second, to explain the Board's investigation process, the Shinns called the Deputy Director of the Board to testify. She explained that, due to confidentiality concerns, she could not explicitly state whether or not HCA had reported to the Board. She further testified that once a nurse is under investigation by the Board, the hiring facility must provide all written documentation of the incident, which becomes public record once admitted. We find the following exchange, taken from the Deputy Director's direct examination at trial, most illuminating:

> Q: If no complaint has been filed based [on] this incident, does that indicate that no complaint or no report was submitted . . .?
>
> A: I don't know how to answer this question without violating my oath to the Oklahoma Board of Nursing and violating our procedures and our processes. . . . I can tell you that under circumstances that are - - if there is a report to us of a nursing practice incident that involves significant harm to a patient, death of a patient, something substantial - - something of substantial public interest, those cases are always opened and they are always pursued. . . .
>
> Q: Is a skull fracture a significant injury to a patient?
>
> A: Yes.

Despite the serious nature of the injury, the Deputy Director testified that, according to the Board's licensure records, "no disciplinary action" had been taken by the Board against the nurse. She stated that these records were the same documents used by the Board prior to approving accreditation for a regis-

VI. Plaintiffs' Counsel's Conduct at Trial

As its final allegation of error, HCA contends that the conduct of the Shinns' counsel improperly prejudiced the jury. In support of this proposition, HCA contends that counsel: (1) used the directed verdict as a blank check to imply that their accusations had been supported by the Trial Court's verdict; (2) repeatedly reminded the jury that the Trial Court's verdict was based on lies and misrepresentations that occurred in the courtroom; (3) reminded witnesses that "we're just looking for the truth" and claimed "cover-up;" (4) informed the jury that it had heard "a lot of half truths and we've heard lies."

"In the context of the whole trial," HCA contends, "[counsel] caused harmful error and [*sic*] warrant a new trial." As we previously stated, we will not reverse a judgment based on misconduct of counsel absent a showing that counsel's alleged conduct substantially prejudiced the jury "to the material detriment of the party complaining." Oklahoma Turnpike Auth. v. Daniel, 1965 OK 7,1 13, 398 P.2d 515, 518. Based on the record in this case, it is apparent that HCA's conduct throughout this entire process, rather than that of Plaintiffs' Counsel, substantially influ-

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tered nurse and that Nurse Jacob had subsequently received her registered nurse accreditation from the Board based, in part, on the absence of any disciplinary action on her record. Despite HCA's Associate Chief Nursing Officer's claims that she had filed the report online, the Deputy Director testified, "We don't have the availability to do online reporting of nursing practice incidents."

Although the Shims presented considerably more evidence supportive of the theory of a cover up, we are confident that the examples discussed above support a finding that the Shims had suffered a substantial amount of emotional distress due to this coverup, despite the fact that they did not seek counseling.

enced the jury. And, legitimate comment by Plaintiffs' Counsel on this conduct does not warrant reversal.

CONCLUSION

The Trial Court did not abuse its discretion by imposing a discovery sanction of a directed verdict on liability against HCA, where it had habitually failed to comply with opposing counsel's discovery requests and the Trial Court's previous order compelling compliance with the same. The jury's verdict was not prejudiced by any instructions given at trial, and HCA has failed to preserve its claim of insufficient evidence for review. Further, the Trial Court did not err in permitting evidence of HCAI's net worth to be submitted to the jury. Lastly, we hold that the conduct of counsel for the Shinns, as well as statements concerning liability insurance made by counsel at trial, did not substantially prejudice the jury. We, therefore, affirm.

AFFIRMED.

GOODMAN, P.J., and WISEMAN, J., concur.

APPENDIX B

Filed February 17, 2009

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA
DIVISION II

Case No. 104,093

NATHAN SHINN, a minor, by and through his parents, BRITTANY SHINN and BRANDON SHINN, and BRITTANY SHINN and BRANDON SHINN, individually
Plaintiffs/Appellees,

v.

HCA HEALTH SERVICES OF OKLAHOMA, INC., d/b/a OU MEDICAL CENTER d/b/a CHILDREN'S HOSPITAL; OU MEDICAL CENTER
Defendants/Appellants.

Appeal from the District Court of Oklahoma County, Oklahoma

Honorable Barbara Swinton, Trial Judge

ORDER ON APPELLANTS' PETITION FOR REHEARING

Appellants (HCA) have filed their petition for rehearing arguing again each proposition asserted in their petition in error and brief in chief in this ap-

peal. In addition, HCA asserted that we improperly refused to consider their supplemental authority submitted after the filing of their appellate briefs. HCA requested oral argument regarding the matters raised in their Petition for Rehearing which we granted. Although trial counsel was present, HCA was represented by new counsel at the oral argument[1] and asserted essentially two issues: (1) Instruction No. 9 invaded the province of the jury, improperly permitted the jury to consider HCA's discovery misconduct when determining punitive damages, and misstated the law as to perjury and (2) the default judgment entered as a sanction for HCA's discovery misconduct violated HCA's right to due process of law. We have again reviewed the record regarding these two issues and the supplemental authority issue. Our Opinion adequately addressed the other issues raised in HCA's Petition for Rehearing.

I. Instruction No. 9

Appellate review of errors asserted regarding the trial court's instructions begins with 20 O.S.2001 § 3001.1:

> No judgment shall be set aside or new trial granted by any appellate court of this state in any case, civil or criminal, on the ground of misdirection of the jury or for error in any matter of pleading or procedure, unless it is the opinion of the reviewing court that the error complained of has probably resulted in a miscarriage of justice, or constitutes a sub-

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[1] Attached is a copy of the transcript of the oral argument conducted on September 9, 2008.

stantial violation of a constitutional or statutory right.

Further, absent fundamental error, an appellant may not complain on appeal about a jury instruction, even where objection to the instruction was made in the trial court, unless the ground for the objection is the same one sought to be raised on appeal. *Am. Nat'l Bank & Trust Co. v. BIC Corp.*, 1994 OK CIV APP 70, ¶ 9, 880 P.2d 420, 423. "Trial courts are not traditionally reversed for error unless the error was called to their attention at a time when they themselves could reasonably be expected to correct it." *Gaines v. Sun Refinery and Mktg*, 1990 OK 33, ¶ 20, 790 P.2d 1073, 1080. We first review HCA's challenges to Instruction No. 9 to determine if HCA preserved the errors now asserted for appellate review.

Instruction No. 9 provides:

> You are instructed that Defendant has conducted itself in violation of the laws of the State of Oklahoma. This conduct has occurred in my Courtroom. This conducts [sic] includes a violation of the laws of the State of Oklahoma, as to perjury and disobedience of a direct Court order. You may consider the Defendant's perjury and direct disobedience of a Court order in your consideration of punitive damages for Plaintiffs.
>
> You are to consider these findings of the Court, in addition to the evidence presented, in determining whether Defendant acted in reckless disregard of the rights of others or intentionally and with malice towards others, when you consider punitive damages against

> Defendant in a later part of this trial. If you find that Defendant did not act in reckless disregard of the rights of others, or intentionally and with malice towards others, you may not award punitive damages against Defendant.

HCA's objection to this instruction is reflected in the transcript of the instruction conference:

> [F]irst there is no legal authority or support for the instruction. In addition, there are already OUJI punitive damage instructions that are being given by the Court giving the OUJI punitive damage instructions in addition to this Instruction Number 9, which is not supported by any Oklahoma authority or any authority at all is prejudicial and obviously inconsistent with the uniform instructions.

This is the extent of the objection made to Instruction No. 9 before it was given.

HCA did not offer an alternative to Instruction No. 9 either when submitting its other proposed instructions or when provided with a copy of the proposed instruction. A party's failure to submit alternative instructions will not preclude appellate review for prejudicial error if proper exceptions are noted in the record. *Oklahoma Producing & Ref Corp. v. Freeman*, 1923 OK 55, 212 P. 742. However, we find HCA's objection at the instruction conference to be so vague that it failed to give the district court the opportunity to correct any error about which HCA now complains. "[W]here, as here, no exceptions are saved, the review will be confined to prejudicial error, erroneous statement of fundamen-

tal law, appearing upon the face of the instructions." *Mason v. McNeal*, 1939 OK 449, ¶ 13, 100 P.2d 451, 453. We therefore review the three objections to Instruction No. 9 raised at oral argument for fundamental error. "Fundamental error compromises the integrity of the proceeding to such a degree that the error has a substantial effect on the rights of one or more of the parties." *Sullivan v. Forty-Second West Corp.*, 1998 OK 48, ¶ 7, 961 P.2d 801, 803.

> Oklahoma law has since statehood distinguished "fundamental" error from "ordinary" trial error. Most decisions which correctly articulate the fundamental error doctrine descend from *[Mason v. McNeal]*. There, as here, a party complained of error in the trial court's instruction to which no exception had been interposed at trial.
>
> This court held that where no exception has been saved, the appellate court will look only for "erroneous statement of fundamental law, appearing upon the face of the instructions;" and the court *will not* examine the record further to search for "latent" errors. A party may on appeal secure review of the instructions' scope *only* if he (or she) has excepted to the parts sought to be challenged.

Sellars v. McCullough, 1989 OK 155, ¶ 10, 784 P.2d 1060, 1063 (internal citations omitted).

A.

First, HCA contends Instruction No. 9 conflicts with Instruction No. 4. The latter instruction was taken from OUJI 3.13, which instructs jurors that they are the sole judges of the credibility of wit-

nesses. HCA contends that Instruction No. 9 tells the jury that the district court has already determined the credibility of HCA's witnesses and found that they were lying. We do not find HCA's interpretation to be well-founded.

The district court distinguishes in Instruction No. 9 between two types of conduct: (1) litigation conduct occurring prior to trial and on which the court based its findings that HCA violated the laws of this State and disobeyed a direct court order and (2) the conduct of HCA demonstrated by "the evidence presented." The court instructed the jury to consider both in determining whether HCA had acted intentionally and with malice or in reckless disregard of the Shinns' rights. Further, HCA conceded during oral argument that it violated the Oklahoma Discovery Code[2] and has pointed to no order of the district court directing HCA, in the presence of the jury, to do anything that HCA failed to do. It is certain that paragraph one of the instruction refers, at least in part, to the district court's August 25, 2006, order compelling HCA to produce certain documents, which was entered more than two months before the jury was empaneled. At the sanctions hearing on October 30, the day before trial began, the district found that HCA had failed to comply with that order. The district court instructed the jury to consider HCA's failure to comply with the August 25 order "in addition to" the evidence presented to the jury during trial.

We find no more conflict between instructions Nos. 4 and 9 than would exist between Instruction No. 4

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[2] HCA would excuse that conduct because it contends both parties engaged in such violations.

and any other instruction in which the trial court had made a partial adjudication of some fact or issue in the case.[3] Ultimately, Instruction No. 9 required the jury to consider HCA's pre-trial litigation conduct described by the district court and the conduct shown by the evidence presented during trial in determining whether that conduct justified punitive damages. Consequently, HCA has shown no error with regard to this contention, much less any fundamental error.

B.

Second, HCA contends that Instruction No. 9 permitted the jury to improperly consider discovery misconduct as a basis for awarding punitive damages.[4] HCA has not provided any authority for this proposition and our subsequent review has revealed no controlling, non-statutory authority and a limited number of judicial decisions considering issues related to HCA's argument.[5] We find the statutory authority

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[3] *See, e.g., Mason*, 1939 OK 449 at 9, 100 P.2d at 452 in which the trial court sustained a plaintiff's motion for directed verdict except with respect to one issue submitted to the jury.

[4] We do not deal here with discovery misconduct previously the subject of a sanctions order and subsequently purged by compliance. Further, the Shinns' post-trial motion for sanctions seeking an additional monetary award for essentially the same misconduct was denied. Consequently, there is no argument that HCA was punished twice for the same conduct.

[5] In *Rosenblit v. Zimmerman*, 766 A.2d 749 (N.J. 2001), the court reversed a defendant's judgment because the jury had not been permitted to consider evidence that the defendant had altered patient records, noting that courts have permitted an unfavorable inference in such circumstances or, as a "more traditional remedy," have entered default judgment as a discovery sanction. Another case, decided in the context of bad faith insurance litigation, permitted consideration of a defendant's liti-

dispositive. Based on HCA's discovery misconduct, clearly established in the record, and the Oklahoma Supreme Court's decision in *Payne v. DeWitt*, 1999 OK 93, 995 P.2d 1088, the district court is granted broad authority pursuant to 12 O.S. Supp. 2002 § 3237(B)(2)(c) to fashion appropriate relief. It may not only require the jury to award punitive damages but also take the question from the jury entirely and direct a verdict as to the amount of punitive damages. Here, the district court chose to leave not only the Shinns' entitlement to any punitive damages to the jury but also the amount of such damages should the jury decide that punitive damages were warranted. If the Discovery Code authorized the district court not only to direct a verdict on punitive damages but also to determine the amount of punitive damages based on HCA's discovery misconduct, we find no error in submitting both issues to the jury and allowing the jury to consider that same misconduct when deciding the punitive damages issues.

C.

Third, HCA argues the instruction's reference to perjury was factually and legally unfounded. HCA's factual challenge to Instruction No. 9 is predicated on a distinction it draws between conduct occurring "in my courtroom" and other court proceedings. HCA argues that the jury could only have concluded that the district court was referring to matters that occurred during trial when it referred to HCA's perjury and disobedience to a court order. For the reasons

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gation conduct as evidence of bad faith. *See e.g., Timberlake Constr. Co. v. U.S. Fid. and Guar. Co.*, 71 F.3d 335, 641 ("evidence of an insurer's litigation conduct may, in some rare instances, be admissible on the issue of bad faith").

previously discussed, this interpretation is not sound and is not likely to have been adopted by the jury.

HCA's legal argument assumes that the district court used "perjury" as it is defined in the Oklahoma Criminal Code:

> Whoever, in a trial, hearing, investigation, deposition, certification or declaration, in which the making or subscribing of a statement is required or authorized by law, makes or subscribes a statement under oath, affirmation or other legally binding assertion that the statement is true, when in fact the witness or declarant does not believe that the statement is true or knows that it is not true or intends thereby to avoid or obstruct the ascertainment of the truth, is guilty of perjury.

22 O.S.2001 § 491. Specifically, HCA contends that no perjury was committed because an attorney's signature to discovery responses is not made under oath and, therefore, cannot support a claim of perjury in the criminal sense, even if the discovery responses are, as they were in this case, untruthful.

We are not prepared to adopt HCA's argument that willful obstruction of the discovery process, on the part of either counsel or his client, is beyond the reach of § 491 merely because the client, who has misled its attorney into filing a false discovery response signed no document or because counsel's certification was made pursuant to the "good faith belief" standard of 12 O.S. Supp. 2004 § 2011 rather than "under oath."[6] Section § 491 criminalizes any legally

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[6] 12 O.S. Supp. 2004 § 2011(B) provides:

binding certification required by law that is made without a belief that the statement certified is true or with knowledge that such statement is untrue and made with the purpose of avoiding or obstructing ascertainment of the truth. There is no evidence in the appellate record from which to conclude that either HCA or its trial counsel did or did not have the intent required for a violation of § 491. Nonetheless, it is HCA's responsibility to show the absence of that intent. *Hulsey v. Mid-America Preferred Ins. Co.*, 1989 OK 107, ¶ 7, 777 P.2d 932, 936 ("The appellant bears the total responsibility for including in the appellate record all materials necessary to secure corrective relief"). Further, "[l]egal error may not be presumed in an appellate court from a silent record. The opposite is true. Absent a record showing otherwise, this court presumes that the trial court did not err."

B. . . . By presenting to the court, whether by signing, filing, submitting, or later advocating, a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

1. It is not being presented for any improper or frivolous purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation;

2. The claims, defenses, and other legal contentions therein are warranted by existing law or by the nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

3. The allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

4. The denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

Hamid v. Sew Original, 1982 OK 46, 6, 645 P.2d 496, 497. The record on appeal supports the conclusion that either one or more persons acting on HCA's behalf did not believe the truth of its discovery responses or that HCA's responses were intended to avoid or obstruct ascertainment of the truth. We discuss only four such examples.

1.

First, HCA's general proposition presented during oral argument, that a response to document requests signed only by counsel is not the equivalent of a sworn document, fails to address 12 O.S.2001 § 3233(A), which provides, "Each interrogatory shall be answered separately and fully in writing under oath . . . ." The requirement to sign interrogatories under oath is imposed on HCA, not its counsel. That duty, in this case, was specifically discharged by HCA's Risk Manager on HCA's behalf. Interrogatory No. 2 requested that HCA identify all evidence on which it relied to support its affirmative defenses.[7] HCA failed to identify any supporting evidence and objected to this interrogatory as "premature" but

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[7] For purposes of this discussion, three of HCA's answers to Interrogatory 2 are particularly relevant:

> 1. Defendant denies that it or any of its agents . . . were guilty of any type of professional negligence in the care and treatment provided to Nathan Shinn.
>
> 2. Defendant states that it acted at all times with prudence and ordinary care, and the treatment and services performed for Nathan Shinn were commensurate with the standards of care with other hospitals in the community, or practicing under same or similar conditions.
>
> 3. Defendant denies that the injury and/or damage alleged by Plaintiffs was caused by this Defendant.

stated, without waiving its objection, that it would supplement its answer as discovery progressed.

A defendant who is served with the plaintiff's petition and interrogatories at the same time is permitted an additional fifteen days to answer. 12 O.S.2001 § 3233(A). However, this cannot have been the basis for HCA's objection to Interrogatory No. 2 as premature. HCA did not serve interrogatory answers until more than 180 days after the Shinns filed their petition. This Court is unaware of, and HCA has not shown, any such objection to discovery based on that request being premature, absent an explicit court order or other than as provided in § 3233(A).

A party may obtain discovery regarding any relevant, non-privileged matter with unlimited frequency and use of the discovery methods authorized by the Oklahoma Discovery Code, unless otherwise limited by the court. 12 O.S.2001 §§ 3226(A) & (B)(1). The fact that HCA wanted to conduct discovery was no excuse for refusing to respond to the Shinns' interrogatories. 12 O.S.2001 § 3226(D) ("The fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay discovery by any other party.").Even after the completion of discovery, HCA did not supplement this interrogatory answer. Nonetheless, HCA not only stated that it would, but was also under a duty to, supplement this response to the extent required by 12 0.S.2001 § 3226(E). If the Court assumes that HCA acquired no information subsequent to its initial interrogatory answer that required it to supplement that answer, only one conclusion can be drawn: HCA and its trial counsel failed to conduct the inquiry required by 12 O.S. Supp. 2004 § 2011(B)

and, therefore, misrepresented to the district court that the affirmative defenses asserted in RCA's answer were warranted and founded on evidentiary support. If HCA's answer complied with the requirements of section 2011 when it was filed, the documents on which HCA's affirmative defenses were based were required to be identified in HCA's answer to Interrogatory No. 2.

Further, when the district court considered the Shinns' sanctions motion, the candor and accuracy of HCA's discovery responses were colored by its defense strategy. As discussed in our Opinion, HCA denied in its answer, filed approximately two months prior to its answer to Interrogatory No. 2, that Nathan's fractured skull was caused by the acts or omissions of HCA employees, claiming it had insufficient knowledge on which to answer. At the time this answer was filed, HCA had in its possession the University of Oklahoma Police Department report documenting that not only was HCA employee Renny Jacob responsible for the injuries to Nathan, but also that she had admitted her responsibility. Some seven months prior to filing its answer, HCA had disclosed that information to the Shinns and apologized for the conduct of Nurse Jacob and the injuries she caused to Nathan. HCA's pleading denial is problematic in light of 12 O.S. Supp. 2004 § 2011(B)(4), which requires that any "denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief."[8]

2.

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[8] A similar analysis of HCA's response to certain requests for admission warrants the same conclusion.

The Shinns' Request for Production No. 9 sought: "All employment records for each of Defendant's employees who cared for Nathan Shinn while he was a patient at The Children's Hospital in January 2005." In its November 29, 2005, response to Request No. 9, HCA objected on the grounds that the request was "overbroad" and that the information sought was "irrelevant and unlikely to lead to the discovery of admissible evidence."[9] HCA, just as any other litigant, may take full advantage of the protections provided by the Discovery Code, but no more. It is absolutely confounding and unsupported by any argument offered by HCA to submit that the personnel records of the HCA employee known to have caused the fracture to Nathan Shinn's skull are irrelevant to his parents' suit to recover for those injuries.

Not only were these documents clearly within the scope of a legitimate discovery request, served more than one year prior to their eventual production, but also HCA had been specifically ordered on August 25, 2006, to produce those and other documents the

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[9] In addition, HCA asserted that the request was objectionable because it sought personal information, the disclosure of which would constitute an invasion of Nurse Jacob's privacy. Any expectation of privacy Nurse Jacob had when she accepted employment must be considered in the context of the position she accepted; providing medical care to members of the public admitted for treatment at HCA's hospital. We cannot determine from a review of Nurse Jacob's file the private information about which HCA was concerned when it objected to producing those documents. Regardless, either producing those documents subject to a protective order or redacting any truly private information would have easily solved that concern and resulted in their production well in advance of trial, giving the Shinns a meaningful opportunity to review the documents for any appropriate use in their prosecution of this case.

following week. At the sanctions hearing, HCA argued that the delay in production was justified because its Motion To Reconsider Defendant's Motion To Compel and Motion To Strike and/or Clarify the Court's Ruling Related To Plaintiffs' Motion To Compel (Motion to Clarify), the August 25 Order was not decided until October 24, 2006. The Motion to Clarify was filed September 22, 2006. That motion argues two points: (1) the Shinns' motion to compel should be stricken because they had failed to comply with the obligation imposed by 12 O.S. Supp. 2002 § 3237(A)(2) to confer in good faith prior to the filing of that motion and (2) during the August 25 hearing the district court stated that a ruling on the motion to strike would be reserved but subsequently, in chambers, the court ruled on the Shinns' motion ordering HCA to produce various documents. Consequently, HCA contends, it was uncertain what its discovery obligations were until the October 24 ruling.

We find this contention disingenuous. The district court's August 25 Order was sufficiently clear that HCA felt compelled to produce (1) rules and regulations regarding the moving of patients, safety, tube procedure, patient care, chain of command, inpatient care and tube feeding produced on August 30, 2006, and (2) staffing schedules, an OUMC Nursing Policy manual, a Pediatric Surgery Department Policies and Procedures manual, and a patient census on September 20, 2006. Further, a journal entry itemizing what HCA was ordered to produce was submitted to HCA's counsel shortly after the August 25 hearing, but counsel refused to sign that order until October 27, 2007. Regarding the arguments asserted in HCA's Motion to Clarify, there is only one distinction between the documents produced in August and September and the documents produced af-

ter HCA's Motion to Clarify was denied: the last-produced documents were harmful to HCA's defense.

Among the documents produced the Friday before trial were documents from Nurse Jacob's file critical of her ability to care for infants. According to the Shinns' counsel, these documents were found in the middle of a one-hundred plus page personnel file of another HCA nurse involved in the care of Nathan Shinn. The five pages pertaining to Nurse Jacob constituted an Individual Action Plan dated December 16, 2003, and a Reassessment of that Plan dated January 23, 2004. According to the December assessment, Jacob "DOES NOT MEET EXPECTATIONS" and was to be reassessed within six to eight weeks. The January 2004 Reassessment, conducted the year before the injury to Nathan Shinn, also concludes that Jacob had "LIMITED ABILITY" and did not meet HCA's expectations. Those findings and Jacob's clinical performance were to be communicated to her manager "ASAP" for determination of her "readiness for assignment as LPN on the Infant Unit evening/night shift."

Of particular interest in the Reassessment is Jacob's performance in what an HCA witness testified at trial was a training exercise involving finding an infant on the floor after hearing a "thump." The Reassessment notes that Jacob did not stabilize the infant's spine or notify the RN of the incident; omissions Jacob admits repeating when Nathan was injured.

No documents critical of Nurse Jacob were contained in her personnel file produced by HCA on October 27. Had HCA chosen to sequentially number the documents produced, it could be determined whether the misplacement occurred before or after their pro-

duction and, therefore, whether HCA intentionally intended to conceal the damaging documents. Given that HCA's trial counsel stated at the hearing on the motion for sanctions that he had not reviewed these documents prior to their production, sequential numbering appears to have been the only method to ensure that the documents were not intentionally commingled before delivery to the Shinns. At best, counsel's disclosure draws into question HCA's compliance with 12 O.S.2001 § 3234(B) ("A party who produces documents for inspection shall produce them as they are kept in the usual course of business."). Further, HCA's posture with respect to these documents defeats the purpose of the Discovery Code. *See* 12 O.S.2001 § 3225 ("The Discovery Code shall be liberally construed to provide the just, speedy and inexpensive determination of every action.").

3.

HCA's response to the Shinns' Request For Production No. 12 provides additional support for Instruction No. 9. That request sought "[a]ny quality assurance report, study, complaint or incident investigation, or investigation of alleged substandard care or abuse which in any way refers to or concerns Nathan Shinn." HCA initially objected to production of the requested documents but without waiving its objections stated, "Defendant is aware of no such reports or studies." The district court's August 25 Order again required HCA to produce any documents responsive to Request No. 12 or provide an affidavit regarding their nonexistence. In the October 27, 2006, affidavit provided in response, HCA's Risk Manager stated under oath and based on personal knowledge, "There is no incident report regarding the injuries

sustained by Nathan Shinn on January 14, 2005, which would be responsive to Plaintiffs Request for Production Nos. 7 and 12." Although the Risk Manager limits her affidavit to incident reports regarding the injuries sustained by Nathan Shinn on January 14, 2005, the Shinns' Request For Production No. 12 is not so limited. From the record, it does not appear that the Risk Manager drafted the affidavit, and the affidavit may not have been intentionally limited to obstruct the Shinns from finding damaging documents, but, if it was, that conduct meets the definition of perjury. Examination of the documents produced simultaneously with the affidavit supports the latter conclusion.

The Jacob's assessment documents are entitled "PBDS CLINICAL ASSESSMENT SUMMARY/ACTION PLAN." If, as represented by HCA at trial, they were part of a training program, there is no reasonable interpretation of these documents that would lead to the conclusion that they were not quality assurance reports or studies of substandard care referring to or concerning in any way Nathan Shinn. Consequently, despite the affidavit's limitation to incident reports, these documents were clearly within the scope of the Shinns' Request No. 12. Finally, at trial the Risk Manager testified that she was "surprised" that although requested in June 2005, these documents were not actually produced to the Shinns until October 27, 2007.

4.

In June 2005, the Shinns requested the originals, including color versions, of Nathan Shinn's medical file. In its November 29, 2005, response to that request, HCA objected, contending that the request was unduly burdensome and costly but, subject to

that objection, agreed to produce a black and white copy of Nathan's file. From that point until trial, HCA consistently maintained that the original file had been destroyed and did not exist. In her October 27, 2006 affidavit, HCA's Director of Risk Management states that she had reviewed the Shinns' document requests and "conducted a search for any responsive documents." At trial, the Risk Manager testified that she learned the day after she signed her affidavit that the original medical file did, indeed, exist. However, not until five days later, and after the Shinns subpoenaed HCA's medical records department, did HCA produce the original file, including color markings.

The trial testimony of the person designated to respond to the subpoena establishes the following: (1) the witness had been employed in the HCA medical records department for nine and one-half years; (2) the original Shinn file was marked with an orange "Return to Legal File" sticker and would have been kept in the file cabinet reserved for legal files after it was returned from the company responsible for scanning the file; (3) HCA's Risk Manager had access to that file cabinet and would routinely review legal files located therein; (4) throughout the course of this litigation, no one ever asked her to find the original Shinn file, and she did not know it had been requested; and (5) on the Monday before her Wednesday testimony, another HCA medical records department employee handed her the file and told her she would need to appear in response to the subpoena.

The Risk Manager's trial testimony establishes that, according to a note on Nathan's original medical file, her subordinate had apparently requested that

the original medical file and films be secured, and in the ordinary course of business such requests were honored. That request was made on August 16, 2005.

Finally, we note that despite its challenge to the use of the word "perjury," HCA does not challenge the legal or factual foundation for that part of Instruction No. 9 that instructed the jury that HCA had violated a direct court order and the record fully supports that finding. HCA's credibility to this jury was compromised by its own behavior during trial before Instruction No. 9 was given. HCA has theorized, but failed to show, that the jury was misled by Instruction No. 9 or that the instruction resulted in an award of punitive damages that would not otherwise have been rendered. In this regard, the following exchange between the Court and HCA's counsel at the oral argument is definitive:

> [The Court]: . . . would you seriously argue to the Court that there really was no evidence on which the jury could base a verdict for punitive damages in the absence of the instruction and the disobedience of the court order reference?
>
> [HCA Counsel]: No, I would not.

This Court is likewise unpersuaded that Instruction No. 9 "resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right." 20 O.S.2001 § 3001.1.

II. Due Process

At oral argument, HCA expanded on its contention that the district court imposed a directed verdict as a sanction for its failure to comply with discovery without sufficient due process. Specifically, HCA argued that it was denied both notice and a meaningful

opportunity to be heard when the district court: (1) denied HCA's counsel's request to respond in writing to the Shinns' motion for sanctions; (2) declined to allow HCA to supplement the record with evidence of its substantial compliance with discovery; and (3) required HCA to argue the motion with only one hour to prepare for the hearing.

As described by HCA's appellate counsel, HCA's Due Process argument has two aspects: notice and warning. We held in our Opinion, as HCA now concedes, that based on the facts in this case, *Payne v. DeWitt* did not require the district court to warn HCA that failure to comply with its August 25, 2006, order might result in the entry of a directed verdict as to HCA's liability. Consequently, we address the other aspect of HCA's notice argument.

HCA does not contend that it was unaware of the precise nature of the discovery misconduct being asserted by the Shinns, and its detailed response to the Shinns' hearing presentation demonstrates that it was adequately informed of the nature of the conduct it was required to defend. HCA's argument, as now refined, concerns the quality of the hearing it was permitted in response to the motion for sanctions and, specifically, whether that hearing satisfied the requirements of state and federal procedural due process.

> For more than a century the central meaning of procedural due process has been clear: "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." It is equally fundamental that the right to notice and an opportunity to be heard

> "must be granted at a meaningful time and in a meaningful manner."

Fuentes v. Shevin, 407 U.S. 67, 80, 92 S. Ct. 1983, 1994 (1972) (quoting *Baldwin v. Hale*, 1 Wall. 223, 233; *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 1191 (1965) (other citations omitted)). "While [12 O.S. Supp. 2002 § 3237(B)(2)(c)] authorizes the trial court to dismiss an action . . . for violation of an order compelling discovery, the United States Supreme Court has held the trial court may not exercise this authority without affording a party the opportunity for a hearing on the merits of the cause." *Goldman v. Goldman*, 1992 OK CIV APP 151, ¶ 23, 883 P.2d 181, 184 (citing *Societe Internationale Pour Participations Industrielles Et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 78 S. Ct. 1087 (1958)).

Nonetheless, "due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S. Ct. 2593, 2600 (1972).

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335, 96 S. Ct. 893, 903 (1974).

To determine the adequacy of the due process provided with respect to the sanctions order, we begin with the observation that the timing of the hearing on the Shinns' motion was primarily the result of HCA's untimely discovery responses. The Shinns' motion was filed the morning of October 30, 2006, after the weekend was spent reviewing the documents produced by HCA on October 27, documents which the district court had ordered produced within a week following the August 25, 2006, hearing on the Shinns' motion to compel. The district court had also ordered HCA to produce a privilege log for the purpose of determining whether the documents HCA claimed were privileged were in fact protected from production. HCA did not provide the court with its privilege log until the morning of October 30, the day trial was to have begun. The hearing on the Shinns' motion for sanctions was held approximately one hour after counsel for HCA was served with a copy of the motion and the *Payne v. DeWitt* opinion, the principal case relied on by the Shinns and the court. The district court denied counsel's request for the opportunity to file a written response to the factual assertions in the Shinns' motion and to supplement the record with the documents produced by HCA between August 25 and October 27 before ruling on the motion.

At the hearing, counsel for the Shinns made a detailed record regarding the documents the court had ordered produced on August 25, but which HCA had not produced or had only produced on October 27. The Shinns' hearing presentation also addressed HCA's defense of two depositions and other discovery

misconduct in addition to the document production issue. HCA responded, noting that certain of the document requests were satisfied by an affidavit provided on August 28, and that others were addressed in a privilege log. The record establishes that there was a significant discrepancy between what the district court ordered HCA to produce on August 25, and what it produced in response to that order. More importantly, what HCA sought to demonstrate to the district court and on appeal was what it had produced in response to the August 25 Order. The sanctions hearing concerned what HCA had failed to do.

Further, although a central theme in HCA's Due Process argument is that the district court refused to permit a written response to the Shinns' motion for sanctions, nowhere in its appellate briefing does HCA disclose the following: On November 17, 2006, the Shinns filed a second motion for sanctions arguing that essentially the same discovery misconduct presented during the October 30 sanctions hearing also warranted the imposition of a monetary award separate from the jury verdict. On December 5, 2006, HCA filed a thirty-two page written response attaching almost 350 pages of exhibits. Every argument asserted by HCA in this appeal regarding the notice and opportunity to respond to the Shinns' motion for sanctions is made in that response. Consequently, either during the sanctions hearing or subsequent thereto, HCA presented the district court with every argument it has since offered for reversal of the directed verdict on liability. At no time did HCA file a motion for new trial or otherwise seek reconsideration of the default judgment based on the arguments asserted in its December 5 filing.

None of HCA's post-trial or appellate submissions shows that the district court was mistaken with respect to HCA's failure to comply in full with its August 25 order.[10] This fact speaks to whether additional time and a further opportunity to defend the Shinns' motion would have had any probable outcome on the result; the second of the *Mathews* factors. Although the correct result does not guarantee that a party was provided adequate due process, the second *Matthews* factor considers whether additional procedural protection would significantly improve the fact-finding process. We are satisfied that none was required in this case.

On this point, *Goldman* is instructive. As a result of the appellant's failure to comply with the district court's order to produce requested documents, the *Goldman* court dismissed the appellant's claims and denied his request for an evidentiary hearing on the motion for sanctions. The Oklahoma Supreme Court reversed, holding,"[W]hether Appellants' noncompliance may have been excused by inability was a question of fact to be determined by the court upon a proper evidentiary hearing. Counsels' arguments did not provide a sufficient basis for that determination, nor does it appear the trial court looked beyond Appellants' bare noncompliance before dismissing [Appellant's] counterclaims." *Goldman*, 1992 OK CIV APP 151 at IT 26, 883 P.2d at 185.

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[10] Although we denied HCA's motion to supplement the record, we have considered the discovery material proffered in addition to HCA's Response to Plaintiffs' Motion for Trial Sanctions filed December 5, 2006, in our review of the record to determine if the due process provided HCA satisfied Constitutional requirements.

The facts on which *Goldman* was decided are distinguishable. HCA does not argue that, had the court granted its request to respond in writing, it would have shown that its noncompliance with the court's order should be excused because it was unable to comply. Rather, HCA argues that the materials it sought to submit would have shown that it had substantially complied with the court's order. Regardless of the merits of that argument, it is clear that substantial compliance was not satisfactory to the district court. In this regard, the production of two nurses' personnel files is instructive. Ordered to produce those documents the week following the August 25 hearing, a time frame counsel for HCA agreed was reasonable, HCA chose not to produce those documents until October 27. At the hearing, counsel excused this delay, not because HCA was unable to produce the documents but because they were the subject of HCA's Motion to Clarify the district court's August 25 order and that motion was not resolved until October 24, 2006. Regardless of our assessment of the lack of merit in that argument, it does not address the grounds discussed in *Goldman* as relevant to the merits of a discovery sanction imposed for non-compliance with a discovery order.

This record shows that HCA's compliance with its discovery obligations had been a prominent issue in this litigation even before the district court's August 25 order. The district court granted HCA time to prepare for the hearing although not as much time as it would have liked or as might have been warranted had HCA not delayed its material production until the last business day before trial. The hearing lasted approximately two hours, and, with the exception of the written response and supplemental documents, HCA was permitted to make every ar-

gument it desired. Subsequent to the district court's sanctions order, HCA did not seek reconsideration of that order. It was permitted to submit a written response and exhibits and prevailed in its defense of the Shinns' post-trial motion for sanctions. As previously noted, however, HCA has not, in any of its post-trial or appellate submissions, either offered a defense to the factual basis for the Shinns' motion, which was not originally presented to the district court or shown that the district court erred in finding that HCA failed to comply with the August 25 order.

Further, as *Mathews* instructs, the district court correctly considered HCA's obfuscation and delay in framing the sanction entered. HCA had unsuccessfully sought to obtain a continuance of the October 30 trial date, and the record supports the district court's conclusion that HCA's delayed production was an attempt to obtain the continuance it had previously been denied. Likewise, as the district court correctly found, any lesser sanction would have been inadequate. Striking the untimely produced documents would only benefit HCA because those documents were damaging to HCA's liability defense. Because HCA has not shown any prejudice resulting from the amount of time it was given to prepare for this hearing, even if we were to attribute the timing to circumstances not caused by HCA, we find that HCA was not denied a meaningful hearing and opportunity to defend against the Shinns' motion for sanctions.

III. Supplemental Authority

On July 25, 2007, HCA sought to supplement its appellate briefing in reliance on the Oklahoma Supreme Court's decision in *Miller Dollarhide v. Moshe Tal*, 2007 OK 58, 163 P.3d 548, issued subsequent to

the completion of briefing in this appeal. *Miller* holds that a trial judge should not decide pending motions while a motion to disqualify remains unresolved and should vacate any orders inadvertently decided during the pendency of that motion. "[A] trial judge's continued participation while motions to disqualify are pending results in a deprivation of due process . . . ." *Id.* at ¶ 1, 163 P.3d at 550. In our Opinion, we noted that, although the filing was titled as a notice of supplemental authority, the substance of the filing attempted to raise issues not raised in HCA's petition in error or brief in chief *See Cox Oklahoma Telecom, L.L.C. v. State of Oklahoma ex rel. Oklahoma Corp. Comm 'n,* 2007 OK 55, ¶ 33, 164 P.3d 150, 162 ("The court has on many occasions said that judicial review will not be given to issues that receive only superficial treatment in an appellate brief or to assignments of error that lack a reasoned argument or supporting authority."). In its petition for rehearing, HCA contends that because the *Miller* argument raised issues of due process, it may be addressed for the first time on appeal. *See Patterson v. Beall,* 2000 OK 92, ¶ 1, 19 P.3d 839, 841 ("We may review claims which relate to alleged deprivations of due process of law despite a failure to preserve error.").

The facts relevant to this argument are critical to the disposition of HCA's contention. On September 21, 2006, counsel for HCA made an *in camera* request to disqualify the trial judge, subsequently documenting that request in a written motion. The trial judge denied that motion and it was set for hearing before the chief judge pursuant to Oklahoma District Court Rule 15, 12 O.S. Supp. 2002, ch. 2, app. On September 22, 2006, HCA filed its Motion to Clarify. The chief judge denied the motion to dis-

qualify on October 5, 2006. HCA then filed a petition for writ of prohibition and emergency application for stay in the Supreme Court. The Supreme Court denied HCA's request for a stay of the proceedings on October 26, 2006, and instructed the chief judge to conduct a hearing on HCA's motion to disqualify. The chief judge conducted a hearing on HCA's motion to disqualify and again denied the same by order dated October 26, 2006. The pre-trial conference in this case was held on October 24. During the pre-trial conference, the trial judge denied HCA's motion for summary judgment and signed the order denying HCA's Motion to Clarify.[11]

Because the motion for sanctions was decided after the motion to disqualify was denied, HCA argues that the sanctions order must be set aside. This argument is premised on two assumptions: first, the sanctions order was based solely on the denial of HCA's Motion to Clarify, which was decided two days before the disqualification issue was resolved; and second, *Miller* requires that the ruling on the Motion to Clarify be vacated. This argument fails if the October 24 order simply documented the previous denial, at least by implication, of the Motion to Clarify on August 25, when the district court granted the Shinns' motion to compel and ordered HCA to produce various documents. For purposes of HCA's petition for rehearing, we will assume that HCA's Motion to Clarify was not resolved until October 24.

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[11] HCA did not appeal the ruling on its motion for summary judgment, and consequently, any error regarding the disposition of that motion is not before this Court. 12 O.S. Supp. 2002 § 990A.

Nonetheless, HCA did not appeal the chief judge's order denying the motion to disqualify and that ruling is now final. 12 O.S. Supp. 2002 § 990A. Therefore, unlike *Miller*, the district court judge in this case was not disqualified and was, therefore, the proper judge to decide the Motion to Clarify. As previously discussed, the default judgment was based on the district court's finding, at the October 30 hearing, that HCA had committed discovery misconduct during this litigation and failed to comply with the court's August 25, 2006, Order. Neither of these rulings was made while the motion to disqualify was pending. We are not persuaded that the district court's decision refusing to strike the Shinns' motion to compel was the substantive basis for the default judgment. Assuming that decision was made while the motion to disqualify was pending, the question is whether *Miller* requires the district judge to vacate that order and decide that motion again. For the following reasons, we do not find that action is required by *Miller*.

First, HCA filed its Motion To Clarify after it filed its Motion To Disqualify. "A party on appeal is not permitted to secure a reversal of a judgment based on invited error." *State ex rel. Oklahoma Bar Ass'n v. Perkins*, 1988 OK 65, ¶ 17, 757 P.2d 825, 830. If HCA was concerned about the district court deciding matters while its motion to disqualify was pending, it should have waited to file its Motion to Clarify until the disqualification issue was resolved.

Second, although decided after briefing was complete, *Miller* did not change existing law. As noted in the Opinion, the *Miller* Court found it necessary to write because "[a]pparently, confusion exists over *Clark v. Board of Education of Independent School*

District No. 89, [2001 OK 56, 32 P.3d 581] and its mandate regarding whether a trial court may continue to rule on a matter while a motion to recuse is pending." *Miller,* 2007 OK 58 at ¶ 13, 163 P.3d at 553. It is clear, however, that *Miller* did not create new law. That case follows the law established in *Clark* seven years earlier. Not only was *Clark* available to HCA when it filed its petition in error and appellate briefs, HCA relied on *Clark* when it argued its motion to disqualify to the chief judge on October 26, 2006.[12] The Due Process Clause may permit a party to assert certain issues it failed to preserve for appeal but it does not provide a guise for a party who is fully aware of an issue and who consciously chooses to abandon that issue during the appellate process to change its mind and renew the once abandoned issue in contravention of long established fundamental appellate procedure.

CONCLUSION

HCA has failed to demonstrate error regarding Instruction No. 9 or that it was denied due process prior to being sanctioned for discovery misconduct and violation of a court order by entry of a default judgment as to liability. HCA's argument based on the decision in *Miller Dollarhide v. Moshe Tal* does not establish that the district court's decision denying HCA's Motion To Reconsider Defendant's Motion To Compel and Motion To Strike and/or Clarify the Court's Ruling Related To Plaintiffs' Motion To Compel violated HCA's right to due process of law.

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[12] HCA also acknowledges in its petition for rehearing that it presented this very argument to the district court specifically relying on *Clark*. *See HCA's Petition for Rehearing and Brief in Support* at 15.

REHEARING DENIED.

ORDERED this 12th day of February, 2009.

ALL JUDGES CONCUR.

APPENDIX C

May 11, 2009

IN THE SUPREME COURT OF
THE STATE OF OKLAHOMA

Case No. 104,093

NATHAN SHINN, a minor, by and through his parents, BRITTANY SHINN and BRANDON SHINN, and BRITTANY SHINN and BRANDON SHINN, individually
Plaintiffs/Appellees,

v.

HCA HEALTH SERVICES OF OKLAHOMA, INC., d/b/a OU MEDICAL CENTER d/b/a CHILDREN'S HOSPITAL; OU MEDICAL CENTER
Defendants/Appellants.

Petition for certiorari is denied.

CONCUR: Edmondson, C.J., Kauger, Watt, Colbert, Reif, JJ.

DISSENT: Taylor (by separate writing), V.C.J., Hargrave, Opala, JJ.

DISQUALIFIED: Winchester, J.

Taylor, V.C.J., dissenting to the denial of certiorari:

I respectfully dissent to the denial of certiorari in this case. Jury Instruction Number Nine (9) is clearly and absolutely improper for reasons too numerous to detail in this short writing. Suffice it to say that the Instruction (given during the liability stage!) has the trial judge sponsoring evidence and legal conclusions on an issue (alleged litigation misconduct) that should have never been presented to the jury in the first place. The trial judge "instructed" the jury that the defendant has violated the law "in my courtroom" and further instructed the jury that the defendant had committed "perjury" and "disobedience of a direct Court order." After the trial judge branded the defendant an outlaw and a perjurer, any hope of a fair trial for the defendant was lost. After this Instruction was given by the court, there was no need for the plaintiff to even make closing argument; the conclusion was foregone. This is not harmless error. This is a fundamental denial of the right to a fair trial.

This Instruction might have been given to a jury in an entertaining movie or television show, but it should never have been given to a jury in an Oklahoma courtroom.

APPENDIX D

October 26, 2006

IN THE SUPREME COURT OF
THE STATE OF OKLAHOMA

Case No. 103,870

HCA HEALTH SERVICES OF OKLAHOMA, INC., d/b/a OU MEDICAL CENTER, d/b/a CHILDREN'S HOSPITAL, OU MEDICAL CENTER

Petitioner,

v.

HONORABLE BARBARA G. SWINTON, Judge of the District Court for Oklahoma County, and JUDGE RAY C. ELLIOTT, et al.,

Respondents.

ORDER

Petitioner's emergency stay application is denied. Respondent Presiding Judge, Honorable Ray Elliott, is directed to conduct and conclude a Rule 15 hearing and render a decision thereon by the end of today's business day.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 26TH DAY OF OCTOBER, 2006.

s/ Joseph M. Watt
CHIEF JUSTICE

CONCUR: Watt, C.J., Opala, Kauger, Edmondson, Taylor, Colbert, JJ.

DISSENT: Lavender, Hargrave, JJ.

NOT PARTICIPATING: Winchester, J.

APPENDIX F

October 27, 2006

IN THE SUPREME COURT OF
THE STATE OF OKLAHOMA

Case No. 103,926

HCA HEALTH SERVICES OF OKLAHOMA, INC., d/b/a OU MEDICAL CENTER, d/b/a CHILDREN'S HOSPITAL, OU MEDICAL CENTER

Petitioner,

v.

HONORABLE BARBARA G. SWINTON, Judge of the District Court for Oklahoma County, and NATHAN SHINN, by and through his parents, BRITTANY SHINN and BRANDON SHINN, individually,

Respondents.

ORDER

Original jurisdiction is assumed. Art. 7, § 4, Okla. Const. Writ of mandamus denied.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 27TH DAY OF OCTOBER, 2006.

s/ Joseph M. Watt

CHIEF JUSTICE

WATT, C.J., LAVENDER, KAUGER, EDMONDSON, TAYLOR, COLBERT, JJ. – concur

OPALA, J. – dissents

WINCHESTER, V.C.J., HARGRAVE, J. – not participating

APPENDIX F

October 30, 2006

IN THE DISTRICT COURT
OF OKLAHOMA COUNTY
THE STATE OF OKLAHOMA

Case No. CJ-2005-5368

NATHAN SHINN, a minor, by and through his parents, BRITTANY SHINN and BRANDON SHINN, and BRITTANY SHINN and BRANDON SHINN, individually

Plaintiffs,

v.

HCA HEALTH SERVICES OF OKLAHOMA, INC., d/b/a OU MEDICAL CENTER d/b/a CHILDREN'S HOSPITAL; OU MEDICAL CENTER

Defendants.

TRANSCRIPT OF PROCEEDING OF MOTIONS IN LIMINE AND MOTION FOR SANCTIONS

APPEARANCES

MR. GERALD E. DURBIN, II, MS. SARAH LEE PARRISH and MR. GLEN MULLINS, Attorney at Law, appearing on behalf of the plaintiffs.

MR. BRENT L. THOMPSON and MR. DENNIS C. ROBERTS, Attorney at Law, appearing on behalf of the defendants.

PROCEEDINGS

(The following proceedings were had October 30, 2006, with Court, counsel and the parties present:)

THE COURT: We're on the record on Shinn versus HCA, CJ-2005-5368, on Motion In Limines and Motion for Sanctions. The plaintiffs' attorney has provided me copies of various cases and I have reviewed *Payne versus DeWitt* and asked the parties to review that case and be prepared to argue it and others that they deem relevant. Are you all ready?

MR. DURBIN: Yes. And may I, Your Honor, point out two things that were not mentioned in chambers factually, not — but this goes to the acts the defendants served as a basis for sanctions.

THE COURT: Okay.

MR. DURBIN: One is that we did not provide the court with yet another supplemental set of requests where they objected to producing what it is that we originally requested and this court compelled and he produced and now they're filing a written objection to those things. And I think interesting. we received three employee's personnel records. Renny Jacobs, who's the nurse who fractured the baby's skull, Stephanie Parsons, who is an RN and is a good nurse and Bonnie Russell.

In Renny Jacobs' personnel records, you look at those, she has to still be working there because there's not one document relating with her leaving. There is a dispute. She says she was allowed to re-

sign as opposed to be fired. They have testified in deposition we fired her, we fired her, we fired her. There's a dispute.

The defendant says we reported her to the Nursing Board, as well as they should have, as well as Mr. Thompson deposed these people on the fact that shouldn't you — don't you expect it, aren't you glad they did that. The Nursing Board —

THE COURT: For the record these people are?

MR. DURBIN: The Shinns.

THE COURT: Thank you.

MR. DURBIN: The people I'm pointing to that the record can't see.

THE COURT: Exactly.

MR. DURBIN: And the Nursing Board is going to be here to testify they have no such record of the complaint. But to the point, we got this Friday afternoon. I looked through Renny Jacobs because those are the only personnel records that were really any interest to me. But, thank heavens, someone in our office went through and looked at Stephanie Parsons.

In the middle of Stephanie Parsons' records are personnel records dealing with Renny Jacobs that before this incident she had done the same thing before, the year before. And in the middle of Stephanie Parsons' records are hidden the Renny Jacobs acts where she committed the similar acts the year before with a baby on the floor. With not reporting conditions, not reporting findings. The exact same thing that this lawsuits about. Friday afternoon we're given, not in Renny Jacobs' records, but in the middle of Stephanie Parsons' records. And I think that serves as additional foundation, plus the arrogance

of after the court compelled them to produce it they come back and object again to things you've already compelled them to produce. That's something that was not mentioned in chambers that I did want to mention.

THE COURT: Defendants' response.

MR. THOMPSON: Personnel records were — personnel records were produced in the form they were kept at the hospital. Mr. Durbin on one hand in chambers says, well, what we got on Friday wasn't really important anyway. I can prove everything I need to prove and now he thinks that there is something important in there. Do you want me to respond with regard to the legal issues as well, Judge, or with what he just said?

THE COURT: To the legal issues and to the *Payne* case.

MR. THOMPSON: Okay. With regard to the *Payne* case, the factors considered are, one, the quantum of prejudice noncompliance has caused the moving party. And, again, Mr. Durbin stated in chambers that what they've given us recently is not really of that much import to me. And it should be noted for the record that since the August 25th hearing we have provided no less than three supplemental sets of discovery responses responding to those matters that were ordered by the court because the court's order in the Motion to Compel was produce those records as quickly as you can get to them. Some of them were easier to find, easier to locate as to what was in affect in '05 than others. Some it took — has taken a great deal of time to determine if those records are even able to be generated in the manner that they were asked for.

With regard to another issue, another factor is whether the court warned the party in advance that noncompliance could lead to dismissal or default judgment. Obviously, that has not occurred.

And Mr. Durbin's point about all of the defense witnesses saying she was fired, she was fired, she was fired is incorrect. If you look at Pam Crawford's deposition, who is the Chief Nursing Officer, she testified, you now, either she was fired or when we called her up to tell her to come in and tell her that she was going to be fired she may have resigned at that time, I don't know.

So the fact that there's not a physical document in Renny Jacob's file saying this is the day she was terminated, like I said, the records speak for themselves. They've been produced. And, again, Mr. Durbin on the one hand says what they gave me on Friday is not going to impact the way I put on evidence in the case. It's not going to impact the evidence I can get in. It's not going to impact the evidence I put on. And that's what he represented in chambers.

Another factor to be considered under the *Payne* case is whether the failure was substantially justified or other circumstances would justify that failure. well, we had pending, as the court is well aware, after the August 25th, 2006 hearing where the court heard plaintiffs' Motion to Compel and made certain rulings on the Motion to Compel, after that point in time where we had a Motion to Strike that Motion to Compel pending. After that time we went through the process of the Rule 15 issues, a period of time where the court agreed to stay rulings on anything in addition, a period of time where we were in Rule 15 limbo at this courthouse because Judge Elliott was

unsure as to whether he could rule or not, a time where also with regard to all of those Rule 15 issues any time I would file anything or submit anything plaintiffs' counsel is arguing that I waived any stay and that I waived any argument that I had with regard to the Rule 15 issues. So we were truly in a Catch-22 from certainly that point forward.

In addition, it states that any — the *Payne* case states that any sanction must be both fair and related to the particular claim or defense at issue in the discovery order. The only — the only thing, the only item that I've heard where the plaintiffs are contending they just haven't gotten anything that they were ordered to produce — that we were ordered to produce is with regard to advertising material. And all you have to do is look at the pretrial order to determine that advertising material doesn't go to a claim or defense in this case. Doesn't go to a plaintiffs' claim, doesn't go to a defense. And that's another factor to be considered in the sanction that's being requested by the plaintiffs.

In addition, Plaintiffs' Motion for Sanctions was filed today. I was handed a copy of this Motion for Sanctions at about nine o'clock. It's about ten o'clock right now. There are a number of factual statements in this Motion for Sanctions that certainly have a slant on them and an argument to them that I would like the opportunity to respond to and file a written response on behalf of my client, but obviously if the court is going to rule on it today, that would prohibit me from doing it. Thank you.

MR. DURBIN: Just factually. What I said is that we can get to the same evidence without those documents. That's what I said. Not that they weren't important. But, Judge, you have the privilege log. We

still don't have those. You have their objection to producing what it is you already compelled them to produce asserting another objection.

I mean, this is such an obvious arrogant, defiance for lack of respect for this court, the like of which I've seen one other time in my career. And I don't think it's personal to Your Honor, I think there's just an arrogance that this medical center over here that's many far — that's not too many blocks from where we sit right now thinks they're immune from the responsibilities of the rules of procedure.

And so substantively what they gave us we can get around. We would never have gotten around, quite frankly the — we wouldn't have known anything about this stuff a year ago, but all these records that we have, we can go into that with these records but we still don't have all the records.

These things we've asked for, it took them a while to find Renny Jacob's personnel records, is that what he's telling you? They couldn't find them, Stephanie Parsons' personnel records until noon Friday before trial. Things we've asked for a year and a half ago.

So I'll shut up factually and let me brain person here talk about the law.

MS. PARRISH: First I'd like to address the *Payne* case, Your Honor, and — because that's what you've asked us to do. And I think the facts are very important in that case because in *Payne* we had a defendant whose crime in the discovery abuse process was failure to show up for his deposition, a noticed deposition. And because of that the court ended up granting default against him, drawing the obvious

assumption that the defendant was trying to cover up the fact that he was behind the wheel of the car that was involved in the car accident and that he was basically trying to keep relevant information about the facts of that case from the court by his failure to show up at his deposition.

Now, I won't go into because factually in our Motion for Sanctions that I know you've just read we go into a lot of the defendants' actions in trying to thwart our attempts to depose their witnesses, but I think that in our case the conduct of HCA is much more egregious than a failure to show up for a deposition. They continue to say that they had filed a Motion to Reconsider your August 25th ruling on our discovery request, but as Mr. Durbin said, we requested those documents almost a year and a half ago when we filed the lawsuit.

In addition to that, that discovery conference occurred almost a month before they began to pursue any kind of Motion to Disqualify you. So for that month they were just in flat out direct, blatant denial of a court order to produce documents. And, in fact, counsel for HCA, Dennis Roberts, was present at that meeting where you ordered them to produce those documents and agreed to produce them within a week of when we were in there.

Further, we prepared a proposed Journal Entry of Judgment memorializing your orders in great detail. We took notes. Mr. Roberts took notes. There was really no question about what you ordered. And, in fact, you trimmed some of our request as to the years they would have to produce certain documents. we thought we had an understanding. We walk out of there. Mr. Roberts has said we're going to produce them. Don't see anything from them. About a month

later they file that Motion to Reconsider and start that Motion to DQ process. Now they're trying to say they were under a stay so they didn't have to respond to that order. They were not under a stay for that full month when they failed to produce those records. And further they were not under a stay once we presented initial argument to Chief Judge Elliott, which was Friday, October 5th. October 5th to the 30th is 25 days. So we have a month previous to setting a motion, the Motion to DQ, and then we have another 25 days post setting that in motion, but when they were not under a stay where they have been just in complete denial of this court's order. Complete noncompliance.

They also talked about those five factors in the *Payne* case. And I wanted to address those. Those in actuality were a five factor test employed by the U.S. Court of Appeals for the Tenth Circuit that COCA adopted in the *Hotels* v. *Kampar* case. And they cite to that in *Payne* and the factors are; number one, "The quantum of prejudice noncompliance has caused the adversary (or moving) party."

And I think that's very significant in this instant litigation because not only have they failed to comply with your order, but they have deprived us of needed documents, relevant documents to which we're entitled under the Discovery Code. That has prejudiced our trial preparation by showing up Friday at noon, the last business day prior to trial, with a few of the relevant documents that they were under court order to produce, they effectively precluded us from seeking further discovery, from scheduling further depositions to explore the issues raised in those documents, from verifying whether, in fact, that affidavit that says they don't have the documents is true. And

as you're aware because of our previous court filings we've had to deal with factual misrepresentations in this case and so we certainly would not just treat an affidavit stating something to be fact to, in fact, be an accurate statement of the existence of that, so we would want to explore all of that.

It's prejudiced us in preparing for trial with regard to preparing cross-examination of witnesses they will be calling, with regard to preparing direct examinations of witnesses that we intend to call because we didn't have the underlying documents. And the whole fact of the matter is we were entitled to them. So I think clearly that first factor weighs in our favor. That's clear.

The second factor, "the extent of interference with the judicial process." Clearly that is in plaintiffs' favor. For defendant arrogantly to continue to violate a court order on discovery for over a total of, let's see, a month, plus 25 days. We're talking two months here and another month if you throw in the intervening time when they were attempting to disqualify you, which I think probably Mr. Thompson just admitted started because of your rulings on our Motion to Compel.

And, you know, there's that Supreme Court case that says an adverse ruling doesn't give a basis to DQ a trial judge.

But in any event, the extent of interference with the judicial process, not only in their failing to comply with that court order, but in their whole course of action from the moment we filed this lawsuit, Judge, up until this morning shows an interference with the judicial process. And we go through in our Motion for Sanctions and set out occasion after occasion after

occasion when they filed frivolous motions, when they have been noncompliant with the court's orders, when they have failed to produce documents, when they have asked for more and more and more time to answer interrogatories.

One of the cases that we cite in our Motion for Sanctions dismissed an action because that party had failed to respond to interrogatories for a period of five months. Well, the defendant here got our interrogatories when we filed the lawsuits. You may recall they filed a Motion to Dismiss, which you denied. It was based on the irrelevant assertion this was a medical negligence case and everyone here knows it's a pure negligence case.

But any event you gave them until September to respond because of that filing of the Motion to Dismiss. September came along, they asked us for more time, we agreed. Then in October, then in November. And in November, after Mr. Mullins had agreed to give them three additional months to answer those interrogatories, they still didn't give us their answers. They were late. He had to write them two letters. We didn't get those answers until December of 2005. And they received those interrogatories in August. That's August to September to October to November to December. That's,you know, four and a half months right there. That action alone, under that one case that we gave you, would justify dismissal and granting of judgment on liability. But that wasn't all they did. That was just at the outset. That was last year in 2005.

So it has been an uphill battle. And I think the extent of the interference with judicial process clearly weighs in our favor. And I'm not going to go

through everyone of their actions because you've read it and you've lived it, so you know.

The next thing, "culpability of the litigant." Here we have a case where an employee of HCA performing her duties cleaning up our baby, changing his sheets, somehow, and we're really not sure because we've not been able to depose her and get straight answers from her, but somehow fractured baby Nathan's skull causing a bilateral skull fracture and bleeding of the brain. She admits that.

Their nurses testify she was acting within her job duties. She was, quote "Just doing her job." I think that the culpability of the litigant is clear here. That weighs in favor of the plaintiffs. That's the third factor that the Tenth Circuit considered.

Now, the fourth factor, "whether the court warned the party in advance that noncompliance could lead to dismissal or default," we didn't have that here, but they didn't have it either in Judge Thompson's case and Judge Thompson held in *Barker* v. *Bledsoe*, although they didn't dismiss the case, he stated that it would have been entirely appropriate. "Although dismissal would have been proper the court compelled answers rather than dismiss the case." That was the case involving the answers to interrogatories.

Further, we have another case where there was no advance warning. It's a Tenth Circuit case as well, the same court as you're aware that utilized those five factors. *American Eagle Insurance* v. *Mid-Continent Aircraft*. That was an air crash case. The aircraft company got in, they destroyed some evidence or they said they couldn't find some evidence relating to the landing gear. And because of that,

without any warning in advance on their spoilation of that evidence, and clearly here we have spoilation of evidence but because of their concealment and their failure to produce we can't even ascertain the extent of the spoilation of their evidence.

But in any event in that Tenth Circuit case *American Eagle* v. *Mid-Continent Aircraft*, they dismissed it and there was no prior warning. So that's that fourth factor.

And then the fifth factor is, "the efficacy of lesser sanctions." Well, I think we can all agree that a lesser sanction is not going to help this defendant comply with your court order.

I don't know what else a court can do other than grant us judgment on the issue of liability because you've issued orders telling them to produce these documents, we've been before you numerous occasions, you've made it abundantly clear what your rulings were. They have tried at every juncture to get around them and they have finally just completely ignored those. So I think that any lesser sanction is not going to get through to this defendant. And I think their actions — their whole discovery attitude is exemplified in all of the frivolous motions that they have filed.

And in this regard I'd also point out to the court that in addition to judgment on liability, we're entitled under that Section(B)(2)(c), which entitles us to judgment on liability. We're also entitled to all of our attorney fees and costs incurred. And we seek those as well in our Motion for Sanctions.

So that is the *Payne* case. I think it clearly shows we're entitled to judgment on liability. And, in fact,

HCA's conduct herein is much more egregious than Larry DeWitt in that *Payne* v. *DeWitt* case.

I also want to point out that we really couldn't have filed — we had a Motion for Sanctions on file. We've asked for sanctions several times because of the nature of defendants' discovery conduct. We couldn't have filed this particular motion until today because that's when we got that production of documents on Friday and this was the first business day after that production that we possibly could have filed this Motion for Sanctions.

That's all I have, Your Honor.

THE COURT: Thank you. Your response.

MR. THOMPSON: From a factual perspective, Judge, we did supplement our discovery responses in response to request for production on August the 30th of '06, five days after the Motion to Compel was ruled on and again on September the 20th of '06. So some sort of a contention that we've just not complied with anything is disingenuous. Those are things that we were able to produce that we produced. We had issues that were addressed in our Motion to Strike the court's rulings on the Motion to Compel that were pending and were not ruled on until the pretrial conference last week. And, again, those were produced last week as well.

With regard to the *Payne* case I think one important distinction between that case and where we find ourselves here is that involved a party's refusal to appear at deposition. And so it put the opposing party in a position where there was no way that they could discover any evidence to prove their case.

Now, on the other hand here the plaintiffs have conducted a number of depositions. They've deposed

a number of people who are former employees of the hospital, current employees of the hospital. They've been able to conduct depositions of those people and do their discovery. You know, and some sort of a contention that the plaintiffs here are without fault in the discovery process is also disingenuous.

We — when we submitted discovery to the plaintiffs we sent a letter, called, asked, hey, why don't you get those responses to us because they were late. Nothing was forthcoming. We had to file a Motion to Compel. I come down here and show up for the hearing on the Motion to Compel and they confess our Motion to Compel at the hearing causing my client to have — for me to have to drive back and forth to Tulsa and show up for the hearing when a telephone call would have done it.

We granted them additional time to respond after they — after they confessed the Motion to Compel we gave them additional time to get documents to us and get responses to us. We did have a good faith issue with regard to medical authorizations. They state in their Motion for Sanctions that that was just all frivolous. That we were filing these motions with regard to the fact that they hadn't produced authorizations. They had produced authorizations for Nathan. That was never the issue. The issue was you had also — we had requested and you signed the order because they confessed the Motion to Compel and authorization on the prenatal record of Mrs. Shinn. That wasn't produced. We sent multiple letters to Mr. Mullins and made calls to Mr. Mullins, sent Mr. Mullins a proposed Motion for Sanctions with a letter that says, "we don't want to file this. Please get it to us." Nothing. And so we filed it. After we filed it, of

course, we come down here for the hearing on it on August 25th and they hand it to us.

So trying to say that, you know, they're lily white here and they have clean hands is ridiculous. I think it is clear — one, I don't know exactly what page Mr. Durbin is referring to in Stephanie Parsons' personnel file, but that would be helpful because —

MR. DURBIN: They aren't Bate stamped, but here it is.

MR. THOMPSON: May I see it?

MR. DURBIN: Absolutely.

MS. PARRISH: There's several pages actually.

MR. THOMPSON: I'll have to have a chance to look at it, Judge. I don't know —

THE COURT: These are your documents.

MR. THOMPSON: I know and I have reviewed them, Judge, but I can tell you I didn't review them before today.

THE COURT: You didn't review the documents to determine if there had been a prior incident involving the same nurse that's at issue here.

MR. THOMPSON: Well, I don't think that that's a prior incident involving her, but I'd have to review it again, Judge.

THE COURT: Well, I would have thought that would have been part of your case preparation that you would have her records pretty well known to you.

MR. DURBIN: And these are personnel records we've been requesting forever they just gave us Friday at noon.

THE COURT: Okay. Go ahead with your argument.

MR. THOMPSON: Unlike the *Payne* case and actually I guess somewhat consistent with the case that counsel cited involving Judge Thompson, Judge Thompson didn't order default. He didn't order dismissal. And unlike the *Payne* case in this case plaintiffs have obviously been in a position to be able to prepare for trial. They've been able to do all the depositions they want to do. The only documents that I know of that — that have not been produced are advertising documents, and we discussed those in chambers, and that was an oversight. There's nothing more than that. It was an oversight.

There's been no contention in this case that advertising or something claimed in a ad was going to have any sort of an impact on this case. That advertising is obviously much of it is publicly available because of what it is and much of it online. But the elements in the *Payne* case that are to be considered for a sanction this severe have not been met. And that's the long and short of it, they just haven't. Thank you.

MS. PARRISH: Your Honor, if I may.

THE COURT: Briefly.

MS. PARRISH: Just a couple quick things. As the court may recall we did confess back in April of 2000 — was it 2006, April 2006 their Motion to Compel and we got those documents to them. But since then it has been a one-sided discovery set of filings of motions on the part of this defendant. And I wanted to show you, since he's a little bit unclear as to what they've not produced as of the pretrial conference which was last Tuesday, they did and we represented

this in our brief to the court, defendant has produced a few responsive documents supplemental to plaintiffs' request numbers 1, 13, 14 and 21 since the discovery hearing before the court.

Defendant has failed to produce responsive documents or provide an affidavit as ordered as to the following production request. This was as of pretrial. Number 2, "entire business files, administrative files and investigation files relating to Nathan Shinn including contracts, agreements, complaints or other documents." If we've gotten anything in the interim on this stop me, but this is my understanding.

MR. DURBIN: The only thing we've gotten is the privilege log. That's all we've got.

(Baby making gurgling noises.)

THE COURT: Can you take him out while we're trying to be on record? Thank you.

MR. DURBIN: The only thing we've gotten is the privilege log where they identify, still have — as we sit here right now still haven't produced.

THE COURT: If you guys get to double team them I'm going to let them double team you with two lawyers.

MR. DURBIN: I'll sit down.

MS. PARRISH: But if somebody's seen something that I have not, please jump up because I wouldn't want to misrepresent that they failed to produce if, in fact, they did. But it's my understanding from my independent going through exhibits and discussions with co-counsel that these are the items. So correct me if I'm wrong. So that's one. Another one — that was our discovery request number two.

Discovery Request Number Three. "All documents relating to public relations or advertising utilized by the defendant, parent" — that was the advertising.

They've conceded they didn't do that. And you had ordered they produce any and all responsive documents for the most current two years.

"All complaints or claims where neglect or abuse has been alleged against the Children's Hospital since January 1 of 2000." That was our Request Number Six.

Your order was, defendant to provide an affidavit verifying that no responsive documents are in defendants' possession if, in fact, they're not, which Mr. Roberts had represented in August that there were none.

Number seven, "All incident reports, memoranda, investigations or inquiries performed by or at the request of you or your staff concerning any person who received an injury while he or she was a patient at Children's Hospital since January 1 of 2000. Please omit the name of the patient."

You ordered that they produce any and all responsive documents from 2003 to December 31, 2005 including the category of the injured party whether they were a patient or a visitor, the injury and the manner in which the injury occurred. They've produced none of that.

Number eight, "Color copies of all medical records, photographs, videotapes and other records and documents relating to Nathan Shinn while he was a patient at Children's."

You ordered them to produce these colored copies as requested and we agreed to bear the cost of same because color copies, you know, cost more than black and white.

The next one. "All employment records for each of defendants' employees who cared for Nathan Shinn while he was a patient at the Children's Hospital in January 2005."

You ordered they produce all responsive employment records for all of its employees who cared for Nathan from January 13 through 31 of '05. Now, Friday, you know, they gave us a few personnel files, some of which are extremely important and relevant to our case.

MR. DURBIN: Just three.

MS. PARRISH: But they only gave us three and as Mr. Durbin has said Renny Jacob's damaging information was kind of sandwiched in someone else's file.

Number 10, our Request Number 10, "All records regarding employee background checks done for all employees that cared for Nathan Shinn while he was a patient at Children's in January 2005."

You ordered that they produce all responsive documents from January 13 to the 31st of '05. We haven't gotten anything.

Number 11, "if an in-house investigation was conducted by or on behalf of defendant, which reason stands to say that it was, and before defendant received formal notice of the plaintiffs' claim or this lawsuit relating to the care in question or the subject matter of this lawsuit, including plaintiffs' claim for

damages, provide any and all documentation relating to such investigations."

You ordered defendant to either produce all responsive documents in its possession, provide an affidavit as to the nature of such documents as to which it asserts a privilege and the specific privilege asserted. Three, provide a risk manager privilege and/or four, produce all relevant documents pursuant to a protective order. And in this regard the parties are directed to conduct a dialogue over the telephone, which never happened, to resolve any remaining issues as to responsive documents as to Request Number 11.

Now, we got that privilege log, which you've seen, Friday right before trial. And that's the only thing that arguably even begins to relate to this that they've coughed up since this order came down.

Number 12, Request Number 12, "Any quality assurance report, study, complaint or incident investigation or investigation of alleged substandard care or abuse which in any way refers to or concerns Nathan Shinn."

You ordered that they produce all responsive documents or an affidavit that no such reports or studies exist. Haven't gotten anything.

Number 13, "All rules, regulations, policies, standards of care, guidelines and procedures utilized by you or in your possession, custody or control for determining whether Children's Hospital had a sufficient number of nursing personnel which includes registered and licensed practical nurses, nurse assistants, medical assistance, orderlies and other staff in January 2005 to A, B and C. A. Provide 24-hour

nursing services; B. Meet the needs of patients; and C. Meet the total nursing needs of patients."

You ordered them to produce all responsive documents pursuant to defendants' representation to the court that it will do so. Haven't gotten — there's a lot of that we have not gotten.

They supplemented. That was one of the things, one of the requests that they supplemented after that court order. So we have gotten a few of those documents, but we have not by any stretch gotten all of those. In fact, there are — there are sections of flow charts and sections of nursing notes that are missing from those documents. The nursing notes and the flow charts from midnight January 14 to midnight January 15 are gone. All the other flow charts and nursing notes are there. We haven't — We haven't gotten any of those.

Then 15, "All agendas, minutes, transcripts or summaries from any meeting of the governing body of the defendant concerning any aspect of care at Children's since January 1, 2000."

You ordered that they produce all responsive documents from 2003 to present. Haven't gotten any of that.

Sixteen, and I apologize for taking all this time, but I think in view of Mr. Thompson's representation that he doesn't understand what he's failed to produce, that we need to enlighten him and so that's why I'm having to do this.

Number 16, "All documentation and reports from any consultant or management personnel hired by you to evaluate the adequacy of care rendered to patients at Children's since January 1 of 2000. This request includes, but is not limited to, any ongoing or

periodic report, study, evaluation or assessment generated by the following consultant or employees of the Children's Hospital. Nurse consultant, pharmaceutical consultant, registered dietician consultant, quality assurance staff or any other health or medical consultant brought in or employed to evaluate or study the adequacy of care."

You ordered that they produce all responsive documents. In the event none pertaining to Nathan Shinn are in existence or of his care and treatment, then defendant was to provide an affidavit verifying same. Haven't seen that.

Number 17, "All internal documents and reports from the medical director or medical advisor of Children's since January 1, 2000, which evaluate, analyze, complain about, assess, reach conclusions or findings or make recommendations about the quality and quantity of nursing services, medical services or any aspects of patient care."

And you ordered them to produce all responsive documents from 2000 to the present. Haven't seen those.

Number 18, "All documents containing a schedule of in-service education or training classes" — do you want to just take judicial notice or —

THE COURT: No. You have to make your record. Go ahead.

Ms. PARRISH: Okay. "All documents containing a schedule of in-service education or training classes conducted at Children's since January 1, 2000 for employees having responsibility for any aspect of patient care."

You ordered they produce all of them limited to employees in the pediatric care unit from 2003 to present. I've seen nothing specific about this. I have seen a couple documents that said "nurse training" or general — which would give you no idea of what specifically was addressed. It clearly doesn't go to the heart of what we're asking here. We want to know were they trained in how to care for patients with respiratory problems, with neurologic disorders. You know, that's what we want to know. We haven't seen that.

Nineteen, "All attendance sheets, rosters of personnel present or documentation which ID's employees who attended any in-service or training program, same order redacting the full names to include only the first name and the initial of the last name." Haven't seen that.

The next, "A copy of any film, video, recording, book, periodical, material or other documentation provided by you or the training coordinator or the defendant to any nursing personnel of said facility since January 1, 2000, for purposes of demonstrating, describing or instructing employees on the proper care of patients."

You ordered that they produce all responsive documents from 2003 to the present utilized for purposes of demonstrating, describing or instructing employees on the proper care of infants. Haven't seen a one. And let me just say, in light of the fact that the nurse who fractured Nathan's skull was involved in a previous incident, it was calendar 2003, requests like this become highly relevant. And not having that kind of information becomes very prejudicial to our trial preparation, Judge.

Number 22, "All documents which relate to Children's and contain an analysis or report of any of the following: Children's Hospital's rate of occupancy, number of beds filled or empty during any report period, level of care required for each member of the patient population, or any evaluation my management regarding the relative success of goals, objectives and strategies established for Children's."

You ordered that they produce all responsive documents as to the pediatric unit from 2003 to present. Haven't seen them.

I'm nearly through, thank heaven.

"Each policy, rule, regulation, standard of care and the like which in any manner concerns the duty, responsibility and/or requirement to document an incident which results in an injury to a patient of defendant."

You ordered that they produce all responsive documents, including risk management policies. I've seen nothing about that. I have seen those documents that say in 2003 Renny Jacob didn't know how to document injuries and didn't do that and didn't report to the head nurse and didn't call a doctor when another child was found on the floor. That was in her — who was in her care.

Number 26, "Each policy, rule, regulation, standard of care and the like which in any manner concerns the duty, responsibility and/or requirement to report the suspension of this abuse of a patient."

You ordered they produce the O.U. Med Center's Nursing Policy and Procedures Manual in it's entirety, a three inch binder located in the infant unit pursuant to the deposition testimony of Stephanie Parsons and the O.U. Medical Center's policy and

procedures manuals. Parties were then to enter into a dialogue and discussion as to any other relevant and specific policies which we might seek.

They've produced a smattering of excerpts of policies. We never — am I correct — never got — We got the whole manual. Okay. we ultimately got that. So they get a pass on 27 — no, excuse me, 26.

Number 27, "A copy of each statement, whether oral or written, taken during the investigation of the incident which resulted in Nathan Shinn being injured and/or the failure to document and/or report the incident and consequential failure to provide contemporaneous medical care for Nathan and/or the suspected abuse of Nathan."

You ordered they produce all responsive documents or in the event that they don't have any provide an affidavit. Now, I don't know what documents they might have. I haven't seen — you know, we have the statements of Renny Jacob that we've had for a while that she gave to the OU Health Sciences Police, but I don't know what else is out there. We really have no way of knowing. And quite frankly I wouldn't trust a representation to that effect without seeing more produced.

And last, but not least 28. "A copy of each document which in any way concerns the investigation of the incident which resulted in Nathan Shinn being injured while a patient in defendant's facility and/or each document which in any way concerns the investigation of the failure to timely chart and/or report the incidents to timely provide a medical examination and medical care for Nathan Shinn."

You ordered they produce all responsive documents including, but not limited to, documents from

their Human Resources Department. I think those are some of the things they're trying to assert privilege concerning. Other documents concerning the reporting on behalf of the hospital on the nurse Renny Jacob's actions to any one or any entity. And as Mr. Durbin informed the court earlier we've seen nothing about that and there is a dispute on that issue. They contend they reported her. That's not been the result of our investigation. And they've produced no documents to show that they did. And the obligation of defendant to report said nurse to the Board of Nursing. That was what you ordered. We haven't received that so.

And then also they — Mr. Thompson represented that we had been able to conduct all the depositions we wanted and that's not true. One in particular that is integral to this case is that of Dr. Honeycutt. He was one of the first physicians who examined Nathan after the injury. And I won't go into detail because I do in our Motion for Sanctions and I know you're intimately familiar with the facts concerning the what has now become known around our office as the Tarrant County fiasco when Mr. Thompson called Dr. Honeycutt's counsel, set up his deposition for two weeks after the trial date. Apparently told her because I'm sure she didn't read it in the newspaper, that we wouldn't be going to trial on the 30th and that you were going to get disqualified.

So then I called her to set up his deposition, which we had been trying to set up — there was a letter September 21st, 2005 from Mr. Mullins to Mr. Thompson in that regard with six names on it including Honeycutts asking do we need to subpoena these folks, are you going to produce them. But in any event I called and his — Honeycutt's counsel in-

formed me that the depo had been set up for mid-November with defense counsel. Why I was calling? Why was I trying to set it up. This case wasn't going to trial. The trial judge was getting DQ'd and when did we file this case anyway.

We had to issue a subpoena, which we did down there and Honeycutt didn't show up. He hijacked our style, our case style, *Shinn* v. *HCA*, filed an independent action in the District Court of Tarrant County because the Court Clerk, Helen, who actually did the letters rogatory at the civil court in Tarrant County refused to take the Motion to Quash and informed Honeycutt's counsel they ought to file it up here with you, as did her supervisor because they went over her head trying to shove this thing at him the day before his deposition was to occur. So then they just took it across the street, filed — hijacked our style, filed an independent action, but instead of filing a petition or something they filed a Motion to Quash.

Then the morning of his deposition they call Mr. Thompson and tell him don't get on a plane, we're not producing Honeycutt, but they don't call me. They don't — Mr. Thompson doesn't call me. So Mr. Mullins goes down there, has a videographer, has a court reporter ready. He doesn't show. The last that I had told Honeycutt's counsel, we had a rash of letters that night before and I said he's under a valid subpoena. Unless you show me a file-stamped copy of that Motion to Quash this baby is on. I never got a file-stamped copy until the day of his deposition. They faxed me one, the legal assistant faxed a file-stamped copy at 5:13 that afternoon after we had been down there. And, there again, a simple phone call, professional courtesy could have — could have

completely stopped at least the wasting of that day and the time and expense of Mr. Mullins. So his representation that we didn't get to depose everyone is just false. And there may be others we would have wanted to depose had we had all those documents, but we just don't know. And that's part of the problem, so I guess that's --

MR. DURBIN: And I don't want to tell her and she can tell you, I just —

THE COURT: Do you need to conference away from the bench? Yes, you do.

MR. DURBIN: Oh.

THE COURT: You all may pace at any time.

MS. PARRISH: Your Honor, there's another deposition we didn't get to take that we wanted to take that's integral to our case and it is of Michele Reading. They declined to produce her. She, in fact, is the one who executed the privilege log about the documents that we had requested. She's Director of Risk Management for O.U. Med Center and Children's. And we tried to depose her. They wouldn't agree to it. We still have yet to depose her and, of course, her testify would have been very important in our trial preparation. So that's yet another person we're aware of that we didn't get to depose as a result of their abusive discovery tactics.

I guess the only thing I do and I'm certainly not going to read it, I've read more than enough today, but on page — beginning on page 14 I discussed the additional acts of HCA that evidence it's abuse of the discovery process and I think this will show the court that this definitely has been an ongoing and ongoing problem with them.

So — and I also think it's important to point out and it does so in this, what actually happened with regard to the medical authorizations. They had a repeated factually incorrect complaint that we failed to provide medical authorizations when, in fact, we did so in December of 2005, January of 2006 and July 18, 2006. So that's all I have.

THE COURT: Thank you. Any response?

MR. THOMPSON: In part of what Ms. Parrish read the court ordered us to either produce documents or provide an affidavit about if — an affidavit confirming that there were no responsive documents and in some situations if there was a privilege or a concern about a privilege, a privilege log and an affidavit.

We provided the privilege log and the affidavit within three days after the court ruled on our motion at the pretrial. This affidavit addresses responses to request for production number 6, 7, 12, 15, 16, 17, 18, 19. Also of note plaintiffs' contend, I guess, that we just didn't produce policies and procedures. Well, when you put them altogether, Judge, these are the policies and procedures we produced. They're part of the plaintiffs' exhibits. It's all but about a quarter of an inch of this. So saying we didn't produce that is disingenuous.

They make comments about the fact that we didn't report — we didn't produce a report that we submitted to the Nursing Board. Well, they've taken depositions and they're aware that back at that time it was an online report and we didn't print it off. Now, if they want to be critical of us for not printing it off, that's fine, but I can't generate something that doesn't exist. And that's a problem with a lot of the

record that Ms. Parrish made is when you look at it in conjunction with this affidavit, look at it in conjunction with the discovery responses we filed and the supplemental responses we filed we can't create things that don't exist. All we can do is produce what does exist.

With regard to this issue with Dr. Honeycutt. It is true. I called Dr. Honeycutt's counsel when we got the letter from plaintiffs' counsel saying that they wanted to depose him. My clients never have been an employer of Dr. Honeycutt, never had any control over Dr. Honeycutt. He's a Health Sciences Center — or was a Health Sciences Center physician. I did get in contact with Dr. Honeycutt through actually his lawyer at Cooks Children's Hospital in Fort worth. Was told, hey, the guys off studying for the boards, then he's taking his boards. He's not going to be back until well after your trial. And I said, well, can you set aside a date the first time he's available in case we don't go to trial. I don't know what conversations were had between that lawyer and Ms. Parrish or anybody from their office, but that's what I did. Out of an abundance of caution I said, well, let's set aside a date since the guys hard to schedule. If we can get him deposed before trial, great, and if not that's fine, too. But at least if the trial did get put off we would be able to get him deposed and I think everybody wanted to get him deposed.

With regard to their request to depose Michele Reading they made a written request of that. I responded and it was while the Rule 15 issues were pending and I said let's get these Rule 15 issues resolved and then we'll produce her if you still think you want to take her deposition. And that's the last I heard of it. There was no issuance of a subpoena, no

follow-up letter saying we really need to get her deposed, no follow-up letter saying Brent, I disagree, either produce her by agreement or we're going to notice her. Nothing. I mean, it was just literally that was it. Because I knew that there would be some significant or could be some significant work product and attorney-client privilege rulings that may need to be made and I wanted to make sure we were on all fours with regard to the Rule 15 issues before that deposition took place.

Finally, with regard to the record made by Ms. Parrish, the Motion that was filed this morning and given to me this morning, much of it is very, very factual. As you know the rules here do not require nor permit filing of all the discovery related pleadings. I think to have a fair judgment of what we've produced following — before and following the August 25th hearing that my client has a right and an opportunity — should have a right to have the opportunity to file a written response to their motion setting forth all of those supplemental discovery responses and at the very least identifying every document that was produced on each of those dates as opposed to, you know, attaching every document, but at least identify them before the court rules on the motion that they have made today.

THE COURT: Thank you. All right. In considering the Motion for Sanctions for failure to participate adequately in the discovery process I've reviewed the *Payne* case, which is actually styled *Rick Payne and Jennifer Payne versus Larry DeWitt* and considered the five factor test adopted from the Tenth Circuit in the *Payne* case. The first test of the quantum of prejudice noncompliance that's caused the adversary party I think is very clear, especially if there are, in

fact, documents showing that the particular nurse in question in this case was, in fact, involved with another injury to a child which was not disclosed.

The fact that the volume of documents or affidavits which were ordered by the court on more than one occasion have not been complied with serves to show the level of prejudice to the plaintiffs in the case.

The second step — or test, the extent of interference with the judicial process. I think the list that Ms. Parrish gave us where I attempted to be very clear in what my expectations were of the defendants with the volume of information that had not been responded to that I felt was relevant and ruled was relevant and to not have affidavits from the litigant as requested stating whether or not there were documents seems to be inexcusable in my mind.

The delay tactics on the part of the defendant have been well established in asking for continuances and delaying responding and hoping that the Motion to Disqualify the trial judge would get them the continuance they previously sought did not work out and I think that may have played part in the failure to provide the necessary documents in this case for the plaintiffs to be properly prepared.

The culpability of the litigant I think is clear in that they've failed to respond as the Court ordered and the Motion to Compel and in determining the liability in this case based on the Saint Francis case I don't believe that there was a whole lot of issue as to whether or not liability based on respondeat superior would have been an issue had the liability stage been tried. But the fact that the privilege log was given to the court the day of trial shows to me the lack of

genuineness of the defendants in trying to get this case ready for trial appropriately.

The fourth test, whether or not the court warned the party in advance was at first troubling to me and then I realized that in the *Payne* case we were dealing with a true litigant situation individual was the one who caused the problem in not showing up for his deposition and prohibiting the discovery that took place here. We don't have that in this case. We have able-bodied attorneys representing the defendant in this case and they're clearly aware of the civil procedure in this state because they were filing their own motions for sanctions and are clearly aware of what sanctions are available and because they have a corporate client they had a duty to provide their client with that information that sanctions are available to the court should they not follow the process.

As to the last test under Payne, the efficacy of lesser sanctions, we explored that prior to going on the record in this argument as to whether or not striking certain documents would be an available sanction that would help and as it was explained and appears obvious to the court now, that would only assist the defendant in this case which is not the point of the sanctions, which is to further hand-tie the plaintiff in trying this case without having received the documents in a timely manner.

So having found that all five factors of the *Payne* case have been met, I'm going to grant the Motion for Sanctions and provide a default judge against the defendant on liability. And the jury trial will go Forward on damages only. And if the parties wish to have some time to prepare not coming to court prepared witness wise for damage witnesses today, you all confer and let me know how you wish to proceed,

if you want to pick the jury today and then start tomorrow with evidence or if you want to delay it a day you all confer and then we'll make that decision in chambers as to when we will proceed on the damages issue. Anything further?

MS. PARRISH: Yes. Your Honor, in that regard since we are going to proceed on damages, we would ask that the defendant immediately provide to us its financial statements and the documents relating to it.

THE COURT: As I recall I reserved that for the liability — I'm sorry, for the damages stage of the trial.

MS. PARRISH: Yes, Your Honor.

MR. THOMPSON: That's right.

THE COURT: Do you have those with you?

MR. THOMPSON: I do.

THE COURT: Okay. If you would provide those to the plaintiff and then you all confer as to how much time you need to prepare for the damages stage of this trial.

MR. DURBIN: And we would still like, Your Honor, before you leave the bench, we'd still like those documents on their privilege log that aren't privileged, those three or four I highlighted, because I'm not going to ask them to give me attorney-client or work product. I would ask that you direct and order them forthwith to produce those documents to us.

THE COURT: The documents need to be provided. If there's a privilege argument to be made with regard to admissibility I'll be happy to consider

those and ask the plaintiff not move them in open court unless they have been ruled upon.

Okay. Let me know when you're ready.

MS. PARRISH: Thank you, Your Honor.

THE COURT: Uh-huh.

(whereupon, the hearing was adjourned and continued until Tuesday morning, October 31, 2006, for trial.)

Supreme Court, U.S.
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(2)

No. 09-311

IN THE
Supreme Court of the United States

HCA HEALTH SERVICES OF OKLAHOMA, INC., d/b/a OU MEDICAL CENTER d/b/a CHILDREN'S HOSPITAL, and OU MEDICAL CENTER,

Petitioners,

v.

NATHAN SHINN, a minor, by and through his parents, BRITTANY SHINN and BRANDON SHINN, and BRITTANY SHINN and BRANDON SHINN

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE OKLAHOMA COURT OF CIVIL APPEALS

BRIEF OF RESPONDENTS IN OPPOSITION

Gerald E. Durbin, II
Katherine T. Loy
Counsel of Record
Glen Mullins
DURBIN, LARIMORE & BIALICK
920 North Harvey
Oklahoma City, OK
(405) 235-9584

October 2009

Counsel for Respondents

QUESTIONS PRESENTED

1. Whether this Court has jurisdiction under 28 U.S.C. § 1257(a) to review a decision of the Oklahoma Court of Civil Appeals where the federal question on which Petitioners seek review – whether the Due Process Clause required the trial judge to recuse herself – was neither addressed by nor presented to the Court of Civil Appeals.

2. Whether Petitioners' due process rights were violated by entry of a default judgment as a sanction for noncompliance with a discovery order where (i) Petitioners knew that default judgment was a possible sanction for noncompliance, (ii) they received a two-hour hearing before the judge during which they were permitted to make any arguments they wished, and (iii) their subsequent written submissions do not call into question the trial court's finding of noncompliance.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATEMENT 1

REASONS FOR DENYING THE PETITION 13

I. The Court Should Not Grant, Vacate, and Remand for Further Consideration in Light of *Caperton*. 13

A. The Court Lacks Jurisdiction to Review the Recusal Issue. 14

B. *Caperton* Is Unlikely to Affect the Recusal Decision in This Case. 17

II. The Due Process Challenge to the Sanctions Hearing Does Not Warrant This Court's Review. 23

A. The Sanctions Hearing Implicated No Split of Authority. 25

B. The Sanctions Hearing Fully Complied With Due Process. 29

CONCLUSION 32

APPENDIX 1a

TABLE OF AUTHORITIES

Page(s)

CASES

Adams v. Robertson,
520 U.S. 83 (1997) 12, 15

Bank One of Cleveland v. Abbe,
916 F.2d 1067 (6th Cir. 1990) 26

Barnett v. Simmons,
197 P.3d 12 (Okla. 2008) 27

Caperton v. A.T. Massey Coal Co.,
129 S. Ct. 2252 (2009) ..... passim

Cox v. West Virginia,
460 S.E.2d 25, 32 (W.Va. 1995) 28

Daval Steel Prods. v. M/V Fakredine,
951 F.2d 1357 (2d Cir. 1991) 26

Doulamis v. Alpine Lake Property Owners Association, Inc., 399 S.E.2d 689
(W. Va. 1990) 28

Ehrenhaus v. Reynolds,
965 F.2d 916 (10th Cir. 1992) 26, 27

FDIC v. Conner,
20 F.3d 1376 (5th Cir. 1994) 26, 30

FDIC v. Daily,
973 F.2d 1525 (10th Cir. 1992) 26, 27

Genentech, Inc. v. U.S. International Trade Commissionn, 122 F.3d 1409
(Fed. Cir. 1997) 26

Hammond Packing Co. v. Arkansas,
212 U.S. 322 (1909) 23

Hernandez v. New York,
500 U.S. 352 (1991) 2

Herndon v. Georgia,
295 U.S. 441 (1935) 14

In re Deville,
361 F.3d 539 (9th Cir. 2004) 26

Jones v. Thompson,
996 F.2d 261 (10th Cir. 1993) 26

Lawrence ex rel. Lawrence v. Chater,
516 U.S. 163 (1996) 18, 20

Mackler Prods., Inc. v. Cohen,
225 F.3d 136 (2d Cir. 2000) 26, 30

Malone v. U.S. Postal Service,
833 F.2d 128 (9th Cir. 1987) 26

Martin v. Brown,
63 F.3d 1252 (3d Cir. 1995) 26

Mathews v. Eldridge,
424 U.S. 319 (1976) 9, 10, 31

Miller Dollarhide, P.C. v. Tal,
174 P.3d 559 (Okla. 2006) 17

Morrissey v. Brewer,
408 U.S. 471 (1972) 23

Ohio Furniture Co. v. Mindala,
488 N.E.2d 881 (Ohio 1986) 25

Pacific Harbor Capital, Inc. v. Carnival Air Lines, Inc., 210 F.3d 1112 (9th Cir. 2000) 28

Payne v. Dewitt, 995 P.2d 1088 (Okla. 1999) 27

Pierce v. Pierce, 39 P.3d 791 (Okla. 2002) 19, 20

Schleper v. Ford Motor Co., Automotive Division, 585 F.2d 1367 (8th Cir. 1978) 26

Stuart I. Levin & Associates P.A. v. Rogers, 156 F.3d 1135 (11th Cir. 1998) 26

Tamari v. Bache & Co., 729 F.2d 469 (7th Cir. 1984) 26, 30

United States ex rel. Jimenez v. Health Net, Inc., 400 F.3d 853 (10th Cir. 2005) 27

STATUTES AND RULES

28 U.S.C. § 1257 ..... i, 1, 14, 15

20 Okla. Stat. § 30.5 25

20 Okla. Stat. § 1403 ..... 6, 7, 15

Federal Rule of Civil Procedure 11 25

Federal Rule of Civil Procedure 37 27

Okla. S. Ct. R. 1.200 25

Okla. Dist. Ct. R. 15 ..... 6, 7, 15

BRIEF OF RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Oklahoma Court of Civil Appeals (Pet. App. 1a-31a) and its opinion on rehearing (*id.* at 32a-63a) are unpublished. The order of the Oklahoma Supreme Court denying the petition for a writ of certiorari (*id.* at 64a-65a) is also unpublished.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 2008. A petition for a writ of certiorari was denied by the Oklahoma Supreme Court on May 11, 2009. On July 20, 2009, Justice Breyer extended the time to file a petition for a writ of certiorari to and including September 8, 2009, and the petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). For reasons explained below (*see* Part I.A *infra*), however, the Court lacks jurisdiction over the recusal issue because it was neither addressed by nor properly presented to the state court that rendered the decision on which Petitioners seek review.

STATEMENT

1. On January 13, 2005, Nathan Shinn, a nine-month-old infant, was admitted to Petitioners' hospital. Pet. App. 2a. In the early morning hours of January 14, Nurse Renny Jacob struck Nathan's head against a nightstand while changing the sheets in his crib. *Id.* Ms. Jacob did not seek medical assistance for Nathan and did not report the

incident. *Id.* Later that morning, a different nurse noticed "swelling and 'sponginess' around Nathan's head," but did not order tests or notify a doctor. *Id.* Nathan's injuries went untreated until his father arrived at the hospital and demanded to see a doctor. *Id.* The doctor determined that Nathan had suffered "multiple skull fractures and an intracranial hematoma." *Id.*[1]

The hospital staff contacted the police and the Oklahoma Department of Human Services ("DHS") about Nathan's injuries. The examining physician told police "that the injury was suspicious and indicated non-accidental trauma." *Id.* at 26a.[2] Ms. Jacob, the nurse who caused Nathan's injuries, "lied about the incident to police" and "signed a sworn statement denying responsibility for Nathan's injury." *Id.* at 2a. Based on this information, the police and DHS investigated Nathan's parents, Respondents Brittany and Brandon Shinn, for

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[1] Petitioners incorrectly assert that Nathan's "injuries resolved themselves without medical intervention." Pet. 4. Yet, according to the court of appeals, the record established that Nathan's injuries "ultimately required further medical care." Pet. App. 25a. Petitioners offer no reason why the Court should accept their version of the facts instead of the state courts' findings. *See, e.g., Hernandez v. New York*, 500 U.S. 352, 366 (1991) ("Our cases have indicated that, in the absence of exceptional circumstances, we would defer to state-court factual findings . . . .").

[2] Petitioners assert that Nathan's injury was "accidental" (Pet. 4), but the state courts made no such finding. To the contrary, the court of appeals noted that the physician thought the injury was "non-accidental" and that the police department "had recommended that the district attorney press charges against the nurse responsible for Nathan's injuries." Pet. App. 26a.

suspected child abuse. *Id.* The Shinns remained under investigation for child abuse for 24 days. *Id.* During this time, the police interrogated each parent separately and an officer was "constantly stationed by Nathan's room." *Id.*

On February 2, 2005 – almost three weeks after the incident – the police asked Ms. Jacob to take a lie detector test. *Id.* at 3a. At that point, she "finally admitted to the police that she had caused Nathan's injuries." *Id.* After Ms. Jacob's confession, the hospital staff waited an additional five days before informing the Shinns of the cause of Nathan's injuries. *Id.* Although the hospital staff knew that DHS was investigating the Shinns for child abuse, "the hospital made no attempt to inform DHS of the incident." *Id.* at 26a. Moreover, the hospital should have informed the Oklahoma Board of Nursing of Ms. Jacob's conduct, but "an overwhelming amount of evidence" suggests that Ms. Jacob was not reported to the nursing board. *Id.* at 28a-29a.

2. In July 2005, the Shinns sued Petitioners HCA Health Services of Oklahoma, Inc. and OU Medical Center (collectively "HCA") for negligence and intentional infliction of emotional distress. *Id.* at 3a. They sought compensatory and punitive damages for Nathan's injuries and pain and suffering, and for their own pain and suffering. *Id.* HCA engaged in "egregious and questionable behavior throughout [the] litigation." *Id.* at 13a.

HCA repeatedly refused to comply with its discovery obligations. For example, HCA objected to producing Ms. Jacob's personnel file on the ground

that it was not relevant. *Id.* at 45a. As the court of appeals observed, "[i]t is absolutely confounding and unsupported by any argument offered by HCA to submit that the personnel records of the HCA employee known to have caused the fracture to Nathan Shinn's skull are irrelevant to his parents' suit to recover for those injuries." *Id.* Moreover, "HCA's non-compliance throughout the discovery process was not confined to the production of documents. The same pattern of obstructive non-compliance is evident throughout the record with regard to requests for admissions, interrogatories and even the production of witnesses for depositions." *Id.* at 4a.

The Shinns responded to HCA's noncompliance by filing a motion to compel the production of documents. *Id.* at 4a. On August 25, 2006, the trial court granted the motion and ordered HCA to produce responsive documents (including Ms. Jacob's personnel file) or to provide an affidavit stating that such documents did not exist. *Id.* at 4a-5a, 57a. The court ordered HCA to fulfill these obligations within a week *Id.* at 4a-5a.

HCA "refused to sign the Journal Entry memorializing the Trial Court's order and failed to respond to the discovery requests as ordered by the Trial Court." *Id.* at 5a. Although the trial court ordered HCA to produce documents within a week of August 25 2006, HCA did not make its "first 'material' attempt at responding to the Shinns' discovery requests" until October 27, 2006 – the Friday afternoon three days before trial. *Id.* at 5a, 10a. This production included "735 pages of

documents, an affidavit, and a privilege log." *Id.* at 10a. The production, according to the court of appeals, differed from earlier productions in only one respect: "the last produced documents were harmful to HCA's defense." *Id.* at 47a.

As part of this production, HCA finally provided the personnel files of Ms. Jacob and two other nurses. *Id.* at 28a. "No documents critical of Nurse Jacob were contained in her personnel file." *Id.* at 47a. Instead, "relevant documentation of Nurse Jacob's performance history was placed in the file of another nurse." *Id.* at 28a. These documents, which had been requested over 14 months earlier, were "critical of her ability to care for infants" and noted that she "does not meet expectations" and has "limited ability." *Id.* at 47a. The documents recount an incident – purportedly a "training exercise" – during which Ms. Jacob found "an infant on the floor after hearing a 'thump.'" *Id.* The report "notes that Jacob did not stabilize the infant's spine or notify the RN of the incident; omissions Jacob admits repeating when Nathan was injured." *Id.*

Because the Friday, October 27 production was untimely and "still largely deficient," the Shinns moved for sanctions on Monday, October 30 – the day the trial was set to begin. *Id.* at 5a. The trial court held a hearing "that lasted approximately two hours," during which "HCA was permitted to make every argument it desired." *Id.* at 57a-58a. After the hearing, the trial court entered a default judgment against HCA as a sanction for its violation of the August 25 order. *Id.* at 5a. A trial on damages was then held. *Id.* The jury returned a verdict of $4

million for Brittany and Brandon Shinn and $5 million for Nathan Shinn in compensatory damages, and $9 million in punitive damages. *Id.*

3. On September 21, 2006 – approximately a month after HCA was ordered to produce documents and a month before trial – HCA first requested that Judge Swinton recuse herself. HCA moved to disqualify Judge Swinton because Gerald Durbin, the Shinns' counsel, was a co-chairman of her reelection campaign and had contributed to her campaign. According to the official election records, Mr. Durbin made a net contribution of $280.23 to Judge Swinton's campaign.[3]

Instead of making an informal, *in camera* request for recusal as required by Oklahoma law, *see* 20 Okla. Stat. § 1403; Okla. Dist. Ct. R. 15, HCA moved to disqualify Judge Swinton on the record before a court reporter. Judge Swinton denied the request. She concluded that disqualification was unnecessary because: (i) she had no way of knowing how much anyone contributed to her campaign, Resp. App. 4a-5a; (ii) her husband, and not the formal co-chairmen,

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[3] The official election records show that, on March 10, 2006, Mr. Durbin contributed $1,000 to Judge Swinton's campaign (the maximum contribution is $5,000). The total amount raised by Judge Swinton's campaign was almost $26,000. Because she was unopposed, Judge Swinton spent only around $7,000 and refunded the rest. On August 13, 2006, Mr. Durbin received a refund of $719.77, and therefore his net contribution was $280.23. *See* Campaign Contributions and Expenditures Report, Form C1R (Oct. 27 2006), *available at* https://www.ok.gov/ethics/crs/c1r/view_c1r.php?reg_id=106308&action=public&report_num=41772.

was "the real operation behind" the campaign, *id.* at 5; and (iii) "there is no ongoing campaign," *id.* Judge Swinton was unopposed for reelection, and therefore Oklahoma law provides that she was deemed reelected on June 7, 2006, the deadline for filing a declaration of candidacy. 26 Okla. Stat. § 6-102. ("Any candidate who is unopposed in any election shall be deemed to have been nominated or elected, as the case may be, and his name will not appear on the ballot at any election in which he is so unopposed."). Thus, when HCA moved to disqualify Judge Swinton, there was no longer an ongoing campaign because she had already been reelected.[4]

After Judge Swinton denied HCA's written motion to disqualify, HCA presented the motion to Chief Judge Elliot. 20 Okla. Stat. § 1403; Okla. Dist. Ct. R. 15. Chief Judge Elliott denied the motion for lack of jurisdiction because HCA had not followed the proper procedure for seeking disqualification.

HCA then filed a petition for a writ of mandamus in the Oklahoma Supreme Court. This mandamus petition challenged only Chief Judge Elliot's procedural ruling, and not the merits of the disqualification issue. The Oklahoma Supreme Court ordered Chief Judge Elliot to hold a hearing on the matter. Pet. App. 66a. After considering the

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[4] Because Judge Swinton was deemed to be reelected before HCA moved to disqualify her, the case does not present Petitioners' first question presented: whether recusal is required "in a case in which the chair of her *ongoing* reelection campaign is lead counsel for one of the parties." Pet. i (emphasis added).

evidence, Chief Judge Elliot denied the motion to disqualify.

HCA then filed a second mandamus petition with the Oklahoma Supreme Court. On October 27, 2006, the Supreme Court exercised its original jurisdiction and denied the petition. *Id.* at 68a.

4. HCA did not challenge the denial of the disqualification motion on appeal. Instead, it raised numerous other issues. *Id.* at 1a-63a. The court of appeals affirmed in all respects. *Id.*

Discovery sanctions. On appeal, HCA argued that the trial court abused its discretion in directing a verdict on liability. On rehearing, HCA argued that the sanctions hearing violated due process. The court of appeals rejected both arguments. *Id.* at 7a-12a, 51a-58a.

In reviewing the decision to impose sanctions for discovery violations, the court had no difficulty determining that HCA's conduct warranted such a sanction. As the court of appeals explained:

- "HCA's failure to comply with discovery in any material way until three days prior to trial impeded the Shinns' ability to prepare for trial." *Id.* at 9a.

- "The delay tactics on the part of the defendant have been well established . . . ." *Id.*

- "The uniform pattern of HCA's failure to respond to legitimate requests throughout the discovery process clearly supports the Trial

Court's finding that this conduct unnecessarily obstructed the judicial process." *Id.*

- "HCA willfully and recklessly disregarded the Trial Court's direct orders." *Id.* at 10a.

- "HCA's first 'material' attempt at responding to the Shinns' discovery requests came fourteen months after the initial request for production of documents was served." *Id.*

- "At best, HCA failed to honor the discovery process until three days before trial, which the Trial Court found to be an attempt to force the Shinns to request a continuance." *Id.* at 12a.

The court also determined that HCA had sufficient notice that a default judgment was a possible sanction for noncompliance, noting that "[t]he record before this Court clearly establishes, beyond any doubt, that counsel for HCA was well aware of the possibility of such a sanction." *Id.* at 11a. Moreover, "HCA's underlying liability for the injuries suffered by the Shinns was admitted prior to trial and the essential facts supporting the Trial Court's directed verdict are not in dispute." *Id.*

On rehearing, the court of appeals held that the sanctions hearing complied with due process. *Id.* at 51a-58a. Applying this Court's decision in *Mathews v. Eldridge*, 424 U.S. 319 (1976), the court of appeals noted that "the timing of the hearing on the Shinn's motion was primarily the result of HCA's untimely discovery responses." *Id.* at 54a. Important to the court's decision was the fact that the additional

procedures requested by HCA would not have changed the outcome of the hearing:

> None of HCA's post-trial or appellate submissions shows that the district court was mistaken with respect to HCA's failure to comply in full with its August 25 order. This fact speaks to whether additional time and a further opportunity to defend the Shinns' motion would have had any probable outcome on the result; the second of the *Mathews* factors. Although the correct result does not guarantee that a party was provided adequate due process, the second *Matthews* factor considers whether additional procedural protection would significantly improve the fact-finding process. We are satisfied that none was required in this case.

Id. at 56a (footnote omitted).

The court of appeals also concluded that the trial court had "correctly considered HCA's obfuscation and delay." *Id.* at 58a. The court of appeals agreed with the trial court that "HCA's delayed production was an attempt to obtain the continuance it had previously been denied." *Id.* at 58a. Moreover, "any lesser sanction would have been inadequate. Striking the untimely produced documents would only benefit HCA because those documents were damaging to HCA's liability defense." *Id.*

Jury Verdict. HCA challenged the jury verdict on the ground that the "award of $9 million in actual damages was not supported by the evidence." *Id.* at 23a-29a. The court of appeals held that HCA failed to preserve this issue for appeal because it did not challenge the sufficiency of the evidence in the trial court. *Id.* at 23a-24a.

In any event, the court of appeals "was confident that the jury's award is supported by competent evidence." *Id.* at 24a n.5. The undisputed evidence of Nathan's skull fractures and subdural hematoma were sufficient to support the jury's award of compensatory damages for his injuries. Likewise, the evidence supported the award of compensatory damages for Brandon and Brittany Shinn. The Shinns sought damages for intentional infliction of emotional distress, and the court concluded that, "[w]ithout question, the Shinns' trauma and stress of discovering that their infant child had suffered a severe head injury was only amplified by the subsequent police investigation." *Id.* at 25a-26a. Moreover, "[t]he record clearly establishes that, but for Nurse Jacob's failure to confess her role in Nathan's injuries, these investigations would not have taken place." *Id.* at 26a. As the court explained, "[t]he bulk of evidence submitted at trial spoke to an alleged coverup by HCA that extended from the moment that Nurse Jacob's actions became known all the way through trial." *Id.* at 25a.

Although HCA characterizes the amount of the verdict as "extraordinary" (Pet. i), it does not challenge the award in this Court.[5]

Jury Instruction No. 9. HCA also challenged the trial court's instruction to the jury that it "may consider the Defendant's perjury and direct disobedience of a Court order in your consideration of punitive damages for Plaintiffs." Pet. App. 12a-15a, 33a-51a. The court of appeals rejected each of HCA's state law arguments.[6]

The court of appeals upheld the jury instruction because it was true: "The substance of the instruction, i.e., that HCA disobeyed a direct court order and that it had falsely asserted that evidence had been destroyed, was predicated on verifiable fact." *Id.* at 15a. According to the court of appeals, "[t]he record is replete with evidence supportive of the Trial Court's instruction based on HCA's lack of candor." *Id.* at 13a. In addition to discussing HCA's

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[5] HCA has never challenged the amount of the punitive damages award. To the contrary, HCA conceded on appeal that there was sufficient evidence on which the jury could have based its award of punitive damages. Pet. App. 51a.

[6] HCA repeatedly insinuates that Jury Instruction No. 9 implicates its due process rights (*see, e.g.,* Pet. i, 3, 4, 8, 9, 10, 11, 21, 24, 29, 31), but HCA does not seek this Court's review of Jury Instruction No. 9. Nor would the Court have jurisdiction to consider the instruction because no federal issue was addressed by or properly presented to the court of appeals. *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (per curiam). Even if a federal issue were passed on by the state court, HCA's failure to preserve its objection to the jury instruction precludes review.

violation of a court order, the court discussed "two specific incidents of gross misconduct to illustrate the tenor of HCA's egregious and questionable behavior throughout litigation." *Id.* Indeed, HCA conceded on appeal that it had violated the Oklahoma Discovery Code. *Id.* at 37a.

The court of appeals also held that HCA failed to preserve its objection to the instruction. *Id.* at 35a-36a. HCA did not offer an alternative to Jury Instruction No. 9, and its "objection at the instruction conference [was] so vague that it failed to give the district court the opportunity to correct any error about which HCA now complains." *Id.* at 35a.

5. The Oklahoma Supreme Court denied HCA's request for review. A dissenting justice expressed his disagreement with Jury Instruction No. 9 (Pet. App. 65a), but no justice expressed any disagreement with the court of appeals' decision on the issues raised in this Petition.

REASONS FOR DENYING THE PETITION

I. The Court Should Not Grant, Vacate, and Remand for Further Consideration in Light of *Caperton*.

HCA does not contend that the denial of the motion to disqualify the trial judge warrants this Court's review. Instead, HCA asks the Court to issue a "GVR" order, granting the petition, vacating the decisions of the Oklahoma Court of Civil Appeals, and remanding for reconsideration in light of this Court's decision in *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009).

A GVR order is not appropriate in this case. *First*, the Court lacks jurisdiction to review the recusal issue because HCA did not appeal the denial of the disqualification motion. *Second*, a GVR order is unwarranted in any event, because there is no likelihood that *Caperton* would cause the Oklahoma Court of Civil Appeals to reach a different result in this case.[7]

A. The Court Lacks Jurisdiction to Review the Recusal Issue.

This Court lacks jurisdiction to review the trial judge's decision not to recuse herself. The Court has jurisdiction to review federal questions decided "by the highest court of a State in which a decision could be had." 28 U.S.C. § 1257(a). If state law permits or requires an issue to be raised on appeal, failure to raise the federal question on appeal precludes this Court's review. *See, e.g.*, *Herndon v. Georgia*, 295 U.S. 441, 443 (1935).[8] Oklahoma law permits the

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[7] As of the filing of this brief in opposition, the Court has not issued any GVR orders involving *Caperton*.

[8] *See also* Eugene Gressman *et al.*, Supreme Court Practice § 3.18(b) (9th ed. 2007) (In addition to properly raising the federal question before the trial court, "[t]he question must also be pursued on appeal to higher state courts, assuming the state procedure so permits or requires."); *id.* ("Failure to follow the appellate channels provided by the state is usually fatal to the chances for Supreme Court review. The litigant will be deemed to have waived the federal issue and there will be no basis for the assertion of the Court's jurisdiction."); 16B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure § 4022 ("If the question was presented to lower state courts, but was not properly preserved on appeal to higher state courts, the requirement that the issue be presented to the highest state court has not been satisfied.").

denial of a motion to disqualify to be raised on appeal from a final judgment. 20 Okla. Stat. § 1403. As the Oklahoma Court of Civil Appeals noted, "HCA did not appeal the chief judge's order denying the motion to disqualify and that ruling is now final." Pet. App. 61a.

HCA contends that, despite its failure to raise the recusal issue on appeal, it preserved the issue by filing a petition for a writ of mandamus with the Oklahoma Supreme Court. Pet. 14-15. According to HCA, the Oklahoma Supreme Court decided the federal due process challenge to the trial judge's eligibility by denying the mandamus petition, and this Court has the power to review the denial of the mandamus petition because it can review all issues decided in earlier appeals. *Id.*

HCA is wrong on both counts. *First*, HCA incorrectly treats a mandamus proceeding as an interlocutory appeal. Oklahoma law makes clear that a mandamus proceeding is a *separate* proceeding, not an interlocutory appeal in the existing case. *Second*, HCA incorrectly assumes that the Oklahoma Supreme Court's denial of the mandamus petition conclusively resolved the federal question. Oklahoma law makes clear that it did not.

1. The Court has stated that, "[w]ith very rare exceptions, we have adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 we will not consider a petitioner's federal claim unless it was either addressed by or properly presented to the state court that rendered the decision we have been asked to review." *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (per curiam) (internal quotation marks and citations omitted). There is no question that the

recusal issue was neither presented to nor addressed by the Oklahoma Court of Civil Appeals.

HCA attempts to avoid the consequences of its failure to appeal the recusal issue by focusing on the Oklahoma Supreme Court's denial of the mandamus petition. HCA recites the principle that, in reviewing a final judgment, this Court can review federal questions resolved in an earlier appeal in the same case. That principle does not apply here because the mandamus proceeding was an *original* proceeding in the Oklahoma Supreme Court, not an interlocutory appeal in this case. *See* Okla. Dist. Ct. R. 15(c) ("An original proceeding in mandamus to disqualify a judge in a civil action or proceeding shall be brought in the Supreme Court."). The Oklahoma Supreme Court's order expressly stated that it was exercising its original jurisdiction. Pet. App. 68a ("Original jurisdiction is assumed.").[9] HCA offers no authority for treating a mandamus proceeding as an interlocutory appeal. Nor does HCA cite any case in which this Court has exercised jurisdiction over a final judgment in which the federal issue in question was not raised on appeal on the ground that the issue was raised in a mandamus proceeding.

2. The Oklahoma Supreme Court did not conclusively decide a federal question because the denial of HCA's mandamus petition was not a

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[9] That the mandamus proceeding was a distinct proceeding, and not an appeal in this case, is also apparent from the caption of the mandamus proceeding, *HCA Health Services of Oklahoma, Inc. v. Swinton*, which states that the trial judge was the respondent in the mandamus proceeding. Pet. App. 68a.

decision on the merits of the claim. The opinion of the Oklahoma Supreme Court states, in its entirety: "Original jurisdiction is assumed. Writ of mandamus denied." Pet. App. 68a (citations omitted). The Oklahoma Supreme Court has held that a summary denial of a mandamus petition is not a decision on the merits of the claim:

> The merits of granting or denying mandamus are often different than those of the underlying claims, and we will not presume that we have adjudicated the underlying merit issues, even if we have exercised our discretionary power to review the petition itself by assuming jurisdiction. . . . We will not assume, from an order silent on rationale, that our denial of relief was on the merits of the underlying claim. Our summary denial of mandamus relief, without an opinion, should not be given preclusive effect.

Miller Dollarhide, P.C. v. Tal, 174 P.3d 559, 566 (Okla. 2006).

In sum, HCA was entitled to raise the recusal issue on appeal from the final judgment. Its failure to do so precludes this Court's review.

B. *Caperton* Is Unlikely to Affect the Recusal Decision in This Case.

Even if this Court had jurisdiction to consider the recusal issue in this case, a GVR order would not be warranted. As HCA acknowledges (Pet. 12), a GVR order is appropriate only if there is "a reasonable

probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration." *Lawrence ex rel. Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam). For at least three reasons, it is not reasonably probable that the Oklahoma Court of Civil Appeals would hold that recusal was required in light of *Caperton*. *First*, that court is unlikely to consider the issue at all, because it was not appealed and therefore is final. *Second*, the Oklahoma courts applied a recusal standard that is very similar to – and arguably more demanding than – the standard applied in *Caperton*. *Third*, the facts of this case are quite different from the facts of *Caperton*, and *Caperton* does not suggest that this is the type of rare and extraordinary case in which recusal is constitutionally required.

1. Even if this Court were to issue a GVR order, the Oklahoma Court of Civil Appeals would be unlikely to reconsider the recusal decision because that decision is final. HCA was permitted by Oklahoma law to challenge the recusal decision on appeal, but it chose not to do so. In its opinion on rehearing, the court of appeals stated that the recusal decision was "final." Pet. App. 61a.

HCA asks this Court to vacate the Court of Civil Appeals' decisions and to remand the case to that court for reconsideration of the recusal issue. In so doing, HCA seeks to vacate decisions issued in appeals in which the recusal issue was neither raised nor decided, and to remand the case for "reconsideration" by a court that never considered the issue in the first place. HCA offers no reason to think that the court of appeals will consider the

recusal issue for the first time on remand. To the contrary, HCA admits (with some understatement) that its failure to appeal the recusal decision may affect the court of appeals' "ability to revisit the propriety of Judge Swinton's refusal to recuse." Pet. 15 n.4.[10]

2. A GVR order is also unwarranted because the recusal standard applied in this case is quite similar to – and arguably more demanding than – the standard applied by this Court in *Caperton*. In *Caperton*, the Court held that due process "require[s] recusal when the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." 129 S. Ct. at 2257 (internal quotation marks and citation omitted). As the Court explained, "[t]he inquiry is an objective one. The Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'" *Id.* at 2262 (internal quotation marks and citation omitted).

Oklahoma courts apply a similar, if not more rigorous, standard in determining whether recusal is necessary. In *Pierce v. Pierce*, 39 P.3d 791 (Okla. 2002), the Oklahoma Supreme Court held that recusal is required when a judge's "impartiality

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[10] To the extent that HCA seeks reconsideration of the mandamus denial, it provides no reason to expect that the state intermediate appellate court would review a decision of the state supreme court in a proceeding under the supreme court's original jurisdiction.

might reasonably be questioned," and that "[t]he question of a judge's appearance of impartiality is determined by an objective standard." *Id.* at 797. Under this standard, recusal was required in *Pierce*—even though there was no evidence of any actual bias—because the lawyer and his father contributed to the judge's campaign the maximum amount allowed under Oklahoma law, and because the lawyer was soliciting funds for the judge during the pending case. *Id.* at 798. Moreover, the court specifically noted that there was no showing that the contributions and solicitations were a minimal part of the judge's campaign. *Id.* As this decision illustrates, *Pierce*'s "impartiality might reasonably be questioned" standard is arguably more rigorous than *Caperton*'s "potential for bias" standard.

In denying HCA's motion to disqualify, Judge Swinton and Chief Judge Elliott both applied the *Pierce* standard. Because these courts applied a standard at least as strict as the *Caperton* standard, the state courts are unlikely to reconsider their previous decisions in light of *Caperton*. A GVR order is therefore unwarranted. *See Lawrence*, 516 U.S. at 167.

3. A GVR order is also unwarranted because *Caperton* does not call into question the state courts' denial of HCA's motion to disqualify. *Caperton* requires a judge to recuse herself "when the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." 129 S. Ct. at 2257 (internal quotation marks and citation omitted). The Court concluded that this standard was satisfied "when a person with a personal stake in a particular case had a

significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent." *Id.* at 2263-64.[11]

In the "extraordinary situation" presented in *Caperton* (*id.* at 2265), the Court concluded that Don Blankenship "had a significant and disproportionate influence in placing Justice Benjamin on the case." *Id.* at 2264. The Court explained:

> Blankenship contributed some $3 million to unseat the incumbent and replace him with Benjamin. His contributions eclipsed the total amount spent by all other Benjamin supporters and exceeded by 300% the amount spent by Benjamin's campaign committee. Caperton claims Blankenship spent $1 million more than the total amount spent by the campaign committees of both candidates combined.

Id. (citation omitted). Although recusal was constitutionally required on these facts, the Court expressly noted that "[a]pplication of the

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[11] HCA incorrectly states that "*Caperton* requires a judge to disqualify herself from a case in which her campaign manager represents a party." Pet. 12. As the Court's opinion makes clear, "raising funds or directing the judge's election campaign" requires recusal only when these actions have "a significant and disproportionate influence in placing the judge on the case." *Caperton*, 129 S. Ct. at 2263-64.

constitutional standard implicated in this case will . . . be confined to rare instances." *Id.* at 2267.

This case does not come close to presenting the sort of "extraordinary situation" that required disqualification in *Caperton*. Here, Judge Swinton was *unopposed* for reelection. Resp. App. 5a. As a result, she was *deemed* reelected – and therefore her campaign ended – over three months before HCA filed its motion to disqualify. *Id.*[12] To the extent that she campaigned before it was clear that her reelection would be unopposed, her husband – and not the campaign's formal co-chairs – organized her campaign. *Id.* Judge Swinton knew who contributed to her campaign, but she did not know how much. *Id.* at 4a-5a. Had she known the contribution amounts, she would have learned that the Shinns' counsel, Mr. Durbin, made a net contribution of only $280.30, or less than 4 percent of her campaign total (which was itself a modest amount). *See* p. 6 *supra*.

On the facts of this case, there is very little chance that the Oklahoma courts would determine that the Shinns' counsel "had a significant and disproportionate influence in placing the judge on the case." *Caperton*, 129 S. Ct. at 2263-64. Indeed, by virtue of the fact that Judge Swinton's reelection was unopposed, it is unlikely that *any* contributor could have had a "significant and disproportionate influence" on the outcome of the election. Accordingly, even if this Court had jurisdiction over

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[12] Under Oklahoma law, an unopposed candidate does not appear on the ballot, but is instead "deemed to have been nominated or elected." 26 Okla. Stat. § 6-102.

the issue, there would be no basis for issuing a GVR order in light of *Caperton*.

II. The Due Process Challenge to the Sanctions Hearing Does Not Warrant This Court's Review.

HCA does not contend that the entry of a default judgment as a sanction for litigation misconduct violates the Due Process Clause. *See Hammond Packing Co. v. Arkansas*, 212 U.S. 322 (1909) (no due process violation for entry of default judgment as sanction for discovery violation). Nor does HCA question in this Court the state courts' determination that the liability issues were undisputed, leaving only the damages issues for trial. Pet. App. 12a. HCA nevertheless asks the Court to grant review of the process by which the trial court entered a default judgment on liability. Pet. 16-29. HCA contends that its due process rights were violated because it was not provided "particularized" notice and was not allowed to file a written response to the sanctions motion or to have an evidentiary hearing. *Id.* HCA asserts that courts are "deeply divided" on these issues, but that is not so.

HCA's argument disregards the fundamental principle that "due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Because of this flexibility, due process may require a particular protection – for example, an evidentiary hearing – in some situations but not in others. As a result, courts can and do reach different conclusions on whether a particular protection is required without creating a split of

authority. The different outcomes merely reflect "a recognition that not all situations calling for procedural safeguards call for the same kind of procedure." *Id.*

Rather than focusing on the particular situation at issue in this case – sanctions for violating the trial court's discovery order – HCA cites sanctions cases arising in a variety of contexts without drawing any distinctions based on the type of sanction being considered, the authority for the sanction, or the reason for the sanction.

HCA thus ignores the substantial differences between imposing sanctions for discovery order violations and imposing sanctions in other contexts. In discovery order cases such as this one, the party has failed to comply with its discovery obligations, and the court has informed the party of its violations and ordered it to comply. Only if the party *continues* its noncompliance – in direct violation of the court's orders as well as the preexisting discovery obligations – will the party be sanctioned for violating a discovery order. By contrast, in other situations the party being sanctioned has not received a prior order informing it of its violations and compelling it to act, and therefore additional protections may be necessary before sanctions are imposed.

Because the sanctions hearing in this case neither implicated a split of authority nor violated due process, no further review is warranted.[13]

A. The Sanctions Hearing Implicated No Split of Authority.

1. HCA incorrectly alleges a split of authority on whether due process requires "particularized" notice before imposing sanctions. Pet. 18-21. HCA asserts that no fewer than five federal courts of appeals and four state supreme courts require "particularized" notice (*id.* at 18), but it cites only one case, *Ohio Furniture Co. v. Mindala*, 488 N.E.2d 881 (Ohio 1986) (per curiam), involving sanctions for a discovery order violation. In *Mindala*, the Ohio court considered the type of notice required under a state *statute* (*id.* at 883); the court did not interpret the federal Due Process Clause. Accordingly, this decision does not create a split of authority on a federal question.[14]

There is no split of authority on whether due process requires "particularized" notice before imposing sanctions for discovery order violations. To the contrary, courts of appeals that, according to

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[13] Review by this Court is not warranted for the additional reason that the court of appeals' opinions are unpublished. As a matter of Oklahoma law, unpublished decisions have no precedential value and cannot be cited in any brief or relied on by any court. 20 Okla. Stat. § 30.5; Okla. S. Ct. R. 1.200(b)(5).

[14] The other cases cited by HCA in support of a "particularized" notice requirement considered sanctions imposed in a variety of contexts, including perjury, improper filings in bankruptcy, and violations of Federal Rule of Civil Procedure 11.

HCA, require "particularized" notice have expressly refused to require such notice for discovery order violations. *Compare* Pet. 18 (citing *Mackler Prods., Inc. v. Cohen*, 225 F.3d 136 (2d Cir. 2000)), *with Daval Steel Prods. v. M/V Fakredine*, 951 F.2d 1357, 1366 (2d Cir. 1991) ("Parties and counsel have no absolute entitlement to be 'warned' that they disobey court orders at their peril."); *compare* Pet. 18 (citing *In re Deville*, 361 F.3d 539 (9th Cir. 2004)), *with Malone v. U.S. Postal Service*, 833 F.2d 128, 133 (9th Cir. 1987) ("[W]e find a warning to be unnecessary here. A plaintiff can hardly be surprised by a harsh sanction in response to willful violation of a pretrial order.").[15]

HCA's mischaracterization of the law with respect to "particularized" notice is especially apparent in its treatment of Tenth Circuit law. The trial court sanctioned HCA under 12 Okla. Stat. § 3237(B)(2). In affirming the trial court's application of this provision, the court of appeals cited Tenth Circuit decisions. Pet. App. 8a (citing *Jones v. Thompson*, 996 F.2d 261, 264 (10th Cir. 1993); *Ehrenhaus v. Reynolds*, 965 F.2d 916, 920-21

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[15] Other circuits that have addressed the issue have reached similar conclusions. *See, e.g.*, *FDIC v. Conner*, 20 F.3d 1376, 1383 (5th Cir. 1994); *Stuart I. Levin & Assocs. P.A. v. Rogers*, 156 F.3d 1135, 1142 (11th Cir. 1998); *Genentech, Inc. v. U.S. Int'l Trade Comm'n*, 122 F.3d 1409, 1422 (Fed. Cir. 1997); *Martin v. Brown*, 63 F.3d 1252, 1263 (3d Cir. 1995); *FDIC v. Daily*, 973 F.2d 1525, 1532 (10th Cir. 1992); *Bank One of Cleveland, N.A. v. Abbe*, 916 F.2d 1067, 1073 (6th Cir. 1990); *Tamari v. Bache & Co.*, 729 F.2d 469, 472-73 (7th Cir. 1984); *Schleper v. Ford Motor Co., Auto. Div.*, 585 F.2d 1367, 1379 (8th Cir. 1978).

(10th Cir. 1992)).[16] The Tenth Circuit has clearly held that "particularized" notice is not required before imposing sanctions for a discovery violation. *See, e.g., FDIC v. Daily*, 973 F.2d 1525, 1532 (10th Cir. 1992) (district court has no "obligation to warn a party specifically that a default judgment is a possible sanction before entering a default judgment. The district court's failure to warn Daily of the possibility of sanctions is of no consequence."). HCA nevertheless treats the Tenth Circuit as a "particularized" notice jurisdiction based on a case in which the court of appeals held that *it* would not impose sanctions on appellants for bringing a frivolous appeal without "giv[ing] Appellants notice that we are contemplating imposing sanctions and an opportunity to respond." *United States ex rel. Jimenez v. Health Net, Inc.*, 400 F.3d 853, 857 (10th Cir. 2005).

2. Similarly, there is no split of authority on the scope of a party's due process right to be heard before sanctions are imposed for discovery order violations. Contrary to HCA's assertion (Pet. 22), federal courts of appeals have not held that due process requires an opportunity to respond in writing before sanctions are imposed. The cases on which HCA relies hold only that an opportunity to file a written response is *sufficient* to satisfy due process; they do not suggest –

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[16] Because section 3237(B)(2) is patterned after Federal Rule of Civil Procedure 37, the Oklahoma Supreme Court has looked to Tenth Circuit decisions interpreting Rule 37 for guidance in interpreting section 3237. *See Barnett v. Simmons*, 197 P.3d 12, 18 (Okla. 2008); *Payne v. Dewitt*, 995 P.2d 1088, 1093 n.6 (Okla. 1999).

as HCA contends – that a written response is *necessary* to satisfy due process. *See, e.g., Pac. Harbor Capital, Inc. v. Carnival Air Lines, Inc.*, 210 F.3d 1112, 1118 (9th Cir. 2000) ("The opportunity to brief the issue fully satisfies due process requirements."). These and other due process cases consider the opportunity to file a written response to be an effective *substitute* for a live hearing before a judge. They do not hold that a party is entitled to *both* a live hearing – which HCA received in this case – *and* an opportunity to file a written response.

Equally baseless is HCA's assertion that some courts have held that due process requires an evidentiary hearing before sanctions can be imposed for discovery order violations. HCA cites only one case, *Doulamis v. Alpine Lake Property Owners Association, Inc.*, 399 S.E.2d 689 (W. Va. 1990) in which an evidentiary hearing was ordered for a discovery order violation. And in that case, the West Virginia Supreme Court merely held that an evidentiary hearing was required before sanctions could be imposed under a state rule of procedure. *Id.* at 693. *Doulamis* did not hold that failure to provide an evidentiary hearing would violate the federal Due Process Clause.[17]

Contrary to HCA's assertion (Pet. 23-24), the Oklahoma courts have not taken a less restrictive

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[17] Moreover, the West Virginia Supreme Court has applied its decision in *Doulamis* to hold that the requirement of an evidentiary hearing is satisfied by a hearing during which the trial court considered the motion for sanctions and the reasons for noncompliance. *See Cox v. West Virginia*, 460 S.E.2d 25, 32 (W.Va. 1995). HCA received precisely this sort of hearing.

approach than other courts. The assertion (Pet. 23) that the trial court sanctioned HCA based "solely on the representations made by respondents in their motion and at the hearing" is incorrect. HCA was given a two-hour hearing during which it had every opportunity to explain why responsive documents were not produced until October 27 when the court ordered them to be produced within a week of August 25. Pet. App. 57a-58a. HCA "argued that the delay in production was justified" because it was unsure of its discovery obligations until October 24 when the court denied its motion to strike. *Id.* at 46a. The court of appeals concluded that the August 25 order was "sufficiently clear" and that HCA's argument to the contrary was "disingenuous." *Id.* Further review of those fact-bound issues is not warranted.[18]

B. The Sanctions Hearing Fully Complied With Due Process.

No due process violation occurred this case. HCA received clear notice – in the form of the trial court's August 25 order – of its failure to comply with its discovery obligations. HCA knew that if it failed to comply with the court's order Oklahoma law authorized the court to enter a default judgment. Pet. App. 11a. Prior to the hearing, the Shinns filed a motion for sanctions, informing HCA that they

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[18] HCA now asserts that its delay in producing documents was "a function of the recusal process and the accompanying stay." Pet. 8. Considering that the motion to disqualify was not filed until *September 21* – several weeks *after* the court's deadline for producing documents – this excuse is just as "disingenuous" as the reason given in the court of appeals.

were seeking a default judgment as a sanction for violation of the August 25 order. During the two-hour hearing on the motion, the Shinns reiterated their request for a default judgment sanction and detailed HCA's failure to comply with the court's order. Yet HCA contends that this notice was not sufficient because the trial court did not state that it was considering granting the Shinns' motion.

No court has held that due process requires the type of notice to that HCA argues it was entitled to receive. Even the "particularized" notice cases on which HCA (incorrectly) relies do not require such notice. *See, e.g., Mackler*, 225 F.3d at 144 ("particularized" notice requirement satisfied where party received a motion discussing the basis for sanctions and was present at a court hearing on the subject). Most importantly, the cases involving sanctions for discovery order violations do not require more notice than was given here. *See, e.g., Conner*, 20 F.3d at 1383 ("Like all court orders, discovery orders are to be obeyed when issued, and sanctions for violating such orders may be imposed without an explicit prior warning or a litany of precautionary instructions."); *Tamari*, 729 F.2d at 472 ("In general, where a party has received adequate notice that certain discovery proceedings are to occur by a specific date, and that party fails to comply, a court may impose sanctions without a formal motion to compel the discovery from the opposing party.").

Nor were HCA's due process rights violated because it was not allowed to file a written response or given an evidentiary hearing. The record does not support HCA's assertion that it was denied an

evidentiary hearing. The transcript of the hearing demonstrates that HCA never requested to present evidence, much less that it made a request to introduce evidence that was denied by the trial court. Pet. App. 70a-105a. Moreover, as discussed above (*see* pp. 25-28 *supra*), HCA cites no case holding that due process requires either of these protections before a party can be sanctioned for violation a discovery order.

The absence of a due process violation is especially apparent because, after the conclusion of the sanctions hearing, HCA was "permitted to submitted a written response and exhibits." Pet. App. 58a. The Oklahoma courts reviewed the submissions and concluded that "HCA has not, in any of its post-trial or appellate submissions, either offered a defense to the factual basis for the Shinns' motion, which was not originally presented to the district court or shown that the district court erred in finding that HCA failed to comply with the August 25 order." *Id.* Indeed, HCA conceded that it violated its discovery obligations in this case. *Id.* at 37a. Because the opportunity to make a written submission and submit evidence would not have changed the outcome of this case, HCA's due process argument lacks merit.

The Oklahoma Court of Civil Appeals concluded that the sanctions hearing complied with due process by applying this Court's decision in *Mathews v. Eldridge*, 424 U.S. 319 (1976). *See* pp. 9-10 *supra*. There is no reason for this Court to reconsider the application of *Mathews* to the particular facts of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Gerald E. Durbin, II
Katherine T. Loy
Counsel of Record
Glen Mullins
DURBIN, LARIMORE & BIALICK
920 North Harvey
Oklahoma City, OK
(405) 235-9584

October 2009

Counsel for Respondents

APPENDIX

September 21, 2006

IN THE DISTRICT COURT
OF OKLAHOMA COUNTY
THE STATE OF OKLAHOMA

Case No. CJ-2005-5368

NATHAN SHINN, by and through his parents, BRITTANY SHINN and BRANDON SHINN, and BRITTANY SHINN and BRANDON SHINN, individually,
Plaintiffs,

v.

HCA HEALTH SERVICES OF OKLAHOMA, INC., d/b/a OU MEDICAL CENTER d/b/a CHILDREN'S HOSPITAL; OU MEDICAL CENTER,
Defendants.

TRANSCRIPT OF PROCEEDINGS OF MOTION TO RECUSE

APPEARANCES

MR. GERALD E. DURBIN, II, MS. SARAH LEE PARRISH AND MR. GLEN MULLINS, Attorneys at Law, appearing on behalf of the plaintiffs.

MR. BRENT L. THOMPSON and MR. DENNIS C. ROBERTS, Attorneys at Law, appearing on behalf of the defendants.

PROCEEDINGS

(The following proceedings were had in open court on September 21, 2006, with Court and counsel present:)

THE COURT: We're on the record on Shinn versus HCA, CJ-2005-5368 for the pretrial. And one party has asked for a court reporter, so whoever asked for that, go ahead and tell me why.

MR. THOMPSON: That would be me, Judge. And the reason I've asked for a court reporter is because of the motion that I've been placed in a position that I hope to never make, but I have to make, and that is a motion pursuant to, even though we're in the courtroom, nobody else is here, Rule 15 – District Court Rule 15A, which requires me to make an in-camera request for you to disqualify from the case before I file a motion requesting you to do so.

THE COURT: What's the basis?

MR. THOMPSON: The basis is a couple of fold. This case was filed in July 2005. You were assigned, I think, from the inception of the case.

THE COURT: Uh-huh.

MR. THOMPSON: And the – according to the judicial – according to the Ethics Commission filings Mr. Durbin became your – the chairman of your campaign – re-election campaign committee for 2006 in March of 2006. That was not disclosed to us at all at any point.

The other basis, and I'll get to the legal parts of it next, but the other factual basis is that based on filings with the State Ethics Commission between Mr. Durbin and other members of his firm they've

contributed almost a third of the total contributions that have been reported to the Ethics Commission for your 2006 re-election campaign.

And the motion comes on based on a couple of legal principles. One is Canon 3 – Canon 3, Section E of the Oklahoma Code of Judicial Conduct and it states:

> "A judge should disqualify himself/herself in a proceeding in which the judge's impartiality might be reasonably questioned."

And the Oklahoma Supreme Court has further defined that standard in the case of *Sadberry versus Wilson*, 1968 OK 61. And it states:

> "Where there are circumstances of such a nature as to the cause" – "as to cause doubts as to the judge's partiality, bias or prejudice, it is a judge's duty to disqualify, even if the judge believes they can be impartial."

And the standard is an appearance of impropriety. It's not from an objective person's perspective, not from yours, not from mine, not from Mr. Durbin's. And so it's on that basis and then there are Supreme Court cases that *Pierce versus Pierce*, Oklahoma Supreme Court 2001 OK 87, required disqualification where there was a significant campaign contribution by an attorney appearing before a judge and they assisted the judge's campaign by soliciting funds.

The case of *Larecy*, L-A-R-E-C-Y *versus Sullivan*, 1952 OK 290. Again, an Oklahoma Supreme Court case. Disqualification was required when a lawyer

was involved in the judges previous campaign, actively campaigned and distributed campaign literature.

At least from our perspective, Judge, we have a situation that's a degree of involvement that's much greater than even those Supreme Court cases suggest and that's why we're asking for you to disqualify in the case, send us to the Chief Judge and have us re-assigned.

THE COURT: Okay. I have had this issue come up this year with John Norman, and do you know Bill Leach?

MR. THOMPSON: I do not.

THE COURT: From Tulsa.

MR. THOMPSON: I do not.

THE COURT: Okay. All right. I was hoping that would help. Okay. Here's a copy of the order dealing with that issue. And I assume because you all are from Tulsa and not from here that you're not familiar with my campaign past.

In 2002, when I first ran for D.J., I had a person that was not a candidate in the race spend $150,000 on T.V. time the last week of the race and so we had a lot of last minute fundraising. And apparently because the way my campaigns are set up I don't ever know how much anyone gives me. All I know is who the contributor lists are so that I can do thank you notes. But I never see the amounts, only my treasurer sees the amounts. And because the ethics rules have changed and the judge is no longer required to sign off on the contributors reports, I don't ever know what the amounts are.

So the case that I've handed you was the case where John Norman was apparently one of the largest donors of my campaign last time in 2002 and someone made a comment during a deposition in Tulsa about, well, we're not going to get anywhere in this case because we didn't give as much money to her campaign as John Norman did, and that's what brought forth the Motion to Recuse. And it was taken up and Judge Dixon was the Chief that month – here's a copy for you guys, sorry – and it was discussed. They did an affidavit from my treasurer at the time, Laura McConnell, to explain I didn't know who the contributors were. Mr. Durbin and Mr. Derryberry were my co-chairmen last time in 2002 and they were the co-chairmen this time in 2006. And because you don't know me well, you don't also know that my husband is a lobbyist and runs campaigns as a hobby and so he is the real operation behind my two campaigns that I have had.

And as you probably know I didn't get an opponent an this time, so there is no ongoing campaign and no ongoing need for Mr. Durbin or Mr. Derryberry to continue in that activity.

So I assume you knew none of that and I thought it would be fair to give you that information and tell you that I'm sure Mr. Durbin would agree that he has not always agreed with my rulings on some of his firm's cases and, in fact, had to take one of his associates to task for their writing style in front of summer interns, which I really hated to do, but I had to do it because that was the appropriate thing to do.

So I understand your concerns, your clients' concerns and where that would come from, but because you may not have had all that historical

benefit of that analysis I will decline the Motion to Recuse. And you can take it up to the Chief, if you wish, or if you want time to look at that order and talk to your client and decide what you want to do, that's fine.

My concern is I don't want to continue the trial in case the Chief denies your motion and we lose the trial date, which is what we spent most of the time talking about in the discovery conference that we had whenever that was, a few weeks ago. So let's see. I can't remember how many days the Chief has to review it. Do you remember?

MR. THOMPSON: No, I don't, Judge.

MS. PARRISH: I have the Rule right here. Let's see.

MR. THOMPSON: Just briefly just for the record purposes and for no other purpose.

THE COURT: Uh-huh.

MR. THOMPSON: Thank you for the explanation, first of all. I appreciate that. But the contribution issue is not the only issue we have. I'm assuming, I haven't looked at the opinion you've handed me, but it does not appear that Mr. Durbin was a lawyer in this case that you've handed me the opinion of, it's John Norman –

THE COURT: No. That issue solely dealt with John Norman.

MR. THOMPSON: Right.

THE COURT: Yeah.

MR. THOMPSON: John Norman. And I'm not aware by any of the Oklahoma Ethics Commission

filings that Mr. Norman has ever served as your chair of your campaign or re-election campaign and so I still have that issue that is separate and apart and different from what was addressed by this *Meeks* opinion by whomever the Chief was at that time.

THE COURT: Judge Dixon.

MR. THOMPSON: Just for the record purposes.

MR. DURBIN: Let me say for the record that if you took this to Judge Dixon, I also was chair of his campaign. If you took this to Judge Ricks, I am on her campaign. If you took this to Judge Gurich, I have been on her campaign re-election committee. There aren't too many judges that I consider to be competent and qualified and ethical that I have not worked for their re-election because justice is best administered by quality judges. And to say that the cost that I and my clients must pay to support quality persons for the bench is the fact we can't try our cases before those judges is a little bit ironic.

I will state for the record, too, that I have never been involved in a meeting that's been private of nature with the Judge. About every committee meeting we've had that I've been at there's been 40 lawyers there. Jerry Green, Pierce Couch; Hugh Baysinger, Pierce Couch. I'm trying to think off the top of my head who are the other defense firms that do medical malpractice defense that have been on the committee.

And whatever has been done effectively in terms of working for her re-election has been done by me with them in a breakfast meeting, two specifically, and there must have been 40 different lawyers there. I've never met with her privately or personally about

her campaign in any of them. And, quite frankly, it's more of a – I think it's more of a figure-head position than it is a substantive position because I'm not much of a politician.

MR. THOMPSON: Well, and the other issue we have, and I'm glad you mentioned that, Mr. Durbin, is that certainly at least our reading of the Canons of Judicial Conduct and the Supreme Court opinions and the Oklahoma Judicial Ethics opinions are that at the very minimum either the level – the level of contribution, whether you knew it on a daily basis or not, and the fact that Mr. –

THE COURT: No, I would never know it.

MR. THOMPSON: Right.

THE COURT: That is my point.

MR. THOMPSON: Well, the fact that Mr. Durbin was the chair of your committee, at least according to public filings as of March of this year, the opinions of the Supreme Court, the Ethics Commission and the Judicial Canons, would require you to at the very least disclose that on the record and that has not been done either.

THE COURT: I think what those cases say that if an attorney has represented you, you have a requirement to disclose that to opposing counsel. I haven't – don't recall any opinions that say if they hold a position on your campaign committee that you're required to disclose that.

MR. DURBIN: I've never heard that.

MR. THOMPSON: Judicial Ethics Opinion 5 – 2001 OK Judicial Ethics 5 states:

> "It is the duty of the presiding judge to disclose on the record any information which the judge believes the parties or attorneys might consider relevant to the question of disqualification, even if the judge believes that there is no real basis for disqualification."

And it's certainly our contention the fact that Mr. Durbin holds the highest position on your re-election campaign committee presently while this case is pending in the year 2006, that that Judicial Ethics opinion would require at least the disclosure of that to me and my clients so it can be addressed.

MR. DURBIN: Excuse me. I'm sorry. Let me just say now, I'll let Sarah Lee take about the law, but I think the problem is 100 miles between Tulsa and Oklahoma City. Because every lawyer, virtually every lawyer in Oklahoma City of any stature or prominence will know who's on the judge's re-election committee because they're there. And the reason you have Tulsa law firms filing these motions is they aren't aware. They aren't sitting there at these and it would be just the opposite probably in Tulsa between Oklahoma City. It's not like Tulsa lawyers are bad lawyers. You have Bill Leach, Tulsa lawyer. You have this firm, Tulsa law firm, but this case could have very well been defended by the Pierce Couch firm. It could have been defended by Robert Margo's firm back when he was doing it and Robert Margo was on your re-election committee, so they would know that.

So I think in fairness they don't know and I don't know of any obligation myself to say anything, but you've got a comment on the law there.

MS. PARRISH: Yeah, I do. A Judicial Ethics opinion in '99 didn't even require a judge to recuse when one of the attorneys appearing before the judge in a contested action previously had represented the judge some years prior to that. They talked about the lawsuit was settled without a trial and the judge had no further attorney-client relationship with the lawyer for over three years. So, you know, that's an even closer type of situation than what we have here. That's Judicial Ethics Opinion Number 1999-3. It's a –

MR. THOMPSON: Very briefly. And Mr. Durbin brought up an outstanding point. I live in Tulsa. I practice – I can't say that I practice primarily in Tulsa, Judge. I'm here a lot. My firm is here a lot. But he brings up an outstanding point. Tulsa lawyers don't have inherent in them the knowledge of things that go on in Oklahoma County, which is exactly why this Judicial Ethics Opinion requires disclosure on the record. That's a perfect point. And that's a perfect example of why that opinion pinned in 2001 is important.

THE COURT: Okay. Well –

MR. THOMPSON: But I understand your ruling.

THE COURT: Okay. All right. More of my concern is how fast can you get it up –

MR. THOMPSON: Next week.

THE COURT: – to the Chief so that we don't lose our trial date.

MR. THOMPSON: Well, my reading of the rules is I need to file a written motion for you to consider.

THE COURT: Well, I assume you brought that.

MR. THOMPSON: Well, I brought it, but since you have given me this –

THE COURT: Uh-huh.

MR. THOMPSON: – I would like the opportunity, if I could have it, until Monday to file it to see if I need to incorporate this in there. I think to be fair I need to incorporate it in.

THE COURT: Okay. I was hoping we would get the motion on file today while you were here.

MR. DURBIN: Why don't you – Why don't you file the motion and just take judicial notice that the motion's amended to the extent –

THE COURT: Because the Chief is going to consider it, not me.

MR. THOMPSON: I want the – I want the Chief to be fair, I mean, it does come to you technically first, I think.

THE COURT: Correct. But because we've done the in-camera in the courtroom without other people on the record –

MR. THOMPSON: Right.

THE COURT: – there's really no point in making you have another hearing –

MR. THOMPSON: Okay.

THE COURT: – once you've filed your motion.

MR. THOMPSON: Okay.

THE COURT: So I will deem your motion filed, if you'll go ahead and get it on file.

MR. THOMPSON: Okay.

THE COURT: And then waive any requirement of having an additional hearing –

MR. THOMPSON: Okay.

THE COURT: – and let you go ahead and take it to the Chief and explain to him why –

MR. DURBIN: Who is the Chief?

THE COURT: This month is Judge Elliott. So we're still meeting so he's not available right this second, but his staff probably can tell you when he can set it even though he's not there.

MR. THOMPSON: Okay.

THE COURT: All right. Thank you very much.

MR. THOMPSON: Thanks, Judge.

THE COURT: So –

MR. DURBIN: Pretrial.

THE COURT: Yeah. Do you all want to continue that and have –

MR. DURBIN: No. Let's hold the pretrial.

THE COURT: What I'm saying is what we can do is as soon as you get a ruling from Judge Elliott, if it's no, then you guys call my office and figure out how to get over here pretty fast.

MR. DURBIN: We have to have a pretrial anyway.

THE COURT: I know you do. I'm just saying timing wise.

MR. THOMPSON: Right. And my concern would be, Judge, I didn't get to this, but I would request that the court stay any further rulings until Judge Elliott has a chance to rule on this and that would include rulings in the pretrial. Because if he says "yes", then we're back at another judge and I'm asking them to reconsider things potentially that are just a waste.

THE COURT: Okay. That's fine. I don't mind striking – the motions are set tomorrow; is that right?

MR. THOMPSON: Right.

MR. DURBIN: Pretrial is today.

THE COURT: Right. But what I'm saying is once you get your ruling from Judge Elliott, then explain to him that you have a trial setting –

MR. THOMPSON: Uh-huh.

THE COURT: – on the – is it the 20th?

MR. THOMPSON: It's on the 30th of August – October.

THE COURT: Okay.

MR. THOMPSON: And I'll make sure that we put that in the motion, too.

THE COURT: Yeah. Explain to them, his staff, that it needs to be set quickly. Next week is a jury week, so I don't know whether or not he will set chief matters on jury weeks, I just don't know.

MR. THOMPSON: Okay.

THE COURT: So you'll have to check with that. But explain to them the necessity to get this going and then as soon as we have a review from Judge

Elliott and his decision, then you guys call my office and we'll figure out how to reset them as expeditiously as possible.

MR. THOMPSON: Right.

THE COURT: And if we need to have the pretrial and summary judgments on the same day, I don't mind doing that.

MR. THOMPSON: Okay.

THE COURT: It's just we need to –

MR. DURBIN: I would like to note for the record that your ruling is contrary to my request. It's what I am – it's different than what I'm asking. I'm asking the court to go ahead and hear the Pretrial Conference Order, hear the summary judgment. This judge is not going to sustain the recusal. This case is going to go on and I'd like to ask the court to go ahead and hear these things.

THE COURT: Okay. Respectfully declined.

MR. DURBIN: See what I mean, being chairman doesn't matter.

THE COURT: All right. See you guys later.

(whereupon, the hearing was adjourned.)

No. 09-311

In the Supreme Court of the United States

HCA HEALTH SERVICES OF OKLAHOMA, INC., d/b/a OU MEDICAL CENTER d/b/a CHILDREN'S HOSPITAL, and OU MEDICAL CENTER,

Petitioners,

v

NATHAN SHINN, a minor, by and through his parents, BRITTANY SHINN and BRANDON SHINN, and BRITTANY SHINN and BRANDON SHINN,

Respondents

On Petition for a Writ of Certiorari to The Oklahoma Court of Civil Appeals

REPLY BRIEF FOR PETITIONERS

CLYDE A. MUCHMORE
Crowe & Dunlevy
20 N. Broadway
Oklahoma City, OK 73102
(405) 235-7734

STEVEN J. RODOLF
LESLIE C. WEEKS
Rodolf & Todd
401 S. Boston Avenue
Tulsa, OK 74103
(918) 295-2100

EVAN M. TAGER
Counsel of Record
DAN HIMMELFARB
BRIAN D. NETTER
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioners

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I THE COURT SHOULD GVR FOR FURTHER CONSIDERATION IN LIGHT OF *CAPERTON*	2
II THE COURT SHOULD GRANT CERTIORARI TO ADDRESS THE SAFEGUARDS THAT MUST BE AFFORDED PARTIES BEFORE THE IMPOSITION OF SEVERE SANCTIONS	6
CONCLUSION	12

TABLE OF AUTHORITIES

Page(s)

CASES

Caperton v *A T Massey Coal Co*
129 S Ct 2252 (2009) . . 2, 4, 5, 6

Direct Plumbing Supply Co v *City of Dayton*,
38 N E 2d 70 (Ohio 1941) . . 9

Doulamis v *Alpine Lake Property Owners Ass'n*, 399 S E 2d 689 (W Va 1990) 11

FDIC v *Daily*,
973 F 2d 1525 (10th Cir 1992) 10

Jensen v *Fed. Land Bank*,
882 F 2d 340 (8th Cir 1989) 8

Kilpatrick v *Bullough Abatement, Inc*
199 P 3d 957 (Utah 2008) . . 9

Laurence v *Chater*
516 U S 163 (1996) 2, 4, 6

Maine v *Superior Court*,
438 P 2d 372 (Cal 1968) . 3

Malone v *U S. Postal Service*,
833 F 2d 128 (9th Cir 1987) 10

Miller Dollarhide, P C v *Tal*,
174 P.3d 559 (Okla 2006) . . 3, 4

Morrissey v *Brewer*,
408 U S 471 (1972) 7

Ohio Furniture Co v *Mindala*,
488 N E 2d 881 (Ohio 1986) . 8, 9

Pac Union Conf of Seventh Day Adventists v *Marshall*, 434 U S 1305 (1977) 3

Patterson v *Beall*,
19 P 3d 839 (Okla 2000) 4

TABLE OF AUTHORITIES – continued

	Page(s)
Pierce v *Pierce*, 39 P 3d 791 (Okla 2001)	2, 4, 6
Reece v *Georgia*, 350 U S 85 (1955)	2
Roadway Express, Inc v *Piper*, 447 U S 752 (1980)	11
Societe Internationale pour Participations Industrielles et Commerciales, S A v *Rogers*, 357 U S 197 (1958)	11
Urie v *Thompson*, 337 U S 163 (1949)	2
STATUTES AND RULES	
28 U S C § 1927	8
FED R APP P 38	8
FED R BANKR P 9011	8
FED R CIV P 11	8, 9, 11

REPLY BRIEF FOR PETITIONERS

The Constitution forbids use of the judicial process to deprive a litigant of property, unless the decisionmaker is impartial and the litigant receives fair notice and a full and fair opportunity to present a defense. As we explained in the petition, HCA was denied these protections and instead was subjected to severe sanctions—ultimately resulting in an $18 million judgment—by a judge who was deeply beholden to the lawyer for HCA's opponents, with no meaningful notice and no opportunity to present evidence in its defense.

Respondents paint a very different picture of the facts underlying the sanctions dispute and the facts giving rise to their injuries.[1] However, they do not dispute the facts that are central to this petition—that Judge Swinton's campaign was chaired by Mr. Durbin, that she issued a sanction of default judgment within hours of receiving respondents' motion, and that she did not consider a shred of evidence before terminating HCA's right to defend on the merits. Respondents' differing view of the propriety of the sanctions *in substance* underscores the importance of following appropriate *procedures* to resolve factual disputes and to determine whether and what kind of sanctions are justified.

[1] Respondents' suggestion that this Court should accept the state courts' characterization of the facts (Opp. 2 n.1) makes no sense in the context of a case in which the defendant challenges a sanction that required the jury (and the reviewing courts) to accept the allegations of the complaint at face value.

I. THE COURT SHOULD GVR FOR FURTHER CONSIDERATION IN LIGHT OF *CAPERTON*.

This Court has jurisdiction over the recusal issue and should GVR in light of *Caperton*, because the petition satisfies the standard set forth in *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam).

Respondents are mistaken in contending that pretrial review via a petition for writ of mandamus has a different effect on this Court's jurisdiction than pretrial review via an interlocutory appeal (see Opp. 15-17), that HCA failed to exhaust its federal claim even though it followed the Oklahoma-law mandamus procedure (see Opp. 18-19), and that *Caperton* would not have influenced the judgment of the Oklahoma Supreme Court (see Opp. 20-23).

A. This Court's jurisdiction extends to "all of the substantial federal questions determined in the earlier stages of the litigation." *Reece v. Georgia*, 350 U.S. 85, 87 (1955). It makes no difference what a state court names those stages or how the "[l]ocal rules of practice" are structured, because otherwise state courts would be able to "bar this Court's independent consideration" by crafting idiosyncratic procedural hurdles. *Urie v. Thompson*, 337 U.S. 163, 172 (1949).

Oklahoma law provides that a party challenging a judge's impartiality before trial must seek a writ of mandamus from the Oklahoma Supreme Court. *Pierce v. Pierce*, 39 P.3d 791, 796 (Okla. 2001); Pet. 6, 14-15. Respondents contend that the mandamus procedure is a mere sideshow and that parties must raise the same arguments on direct appeal if they wish to preserve them for review by this Court.

However, neither the Oklahoma Supreme Court nor this Court treats mandamus as a distinct case divorced from the underlying dispute

The Oklahoma Supreme Court views mandamus as a stage of the overall litigation That is why denials of mandamus are governed by the doctrine of law of the case rather than *res judicata* *Miller Dollarhide, P C* v *Tal*, 174 P 3d 559, 563 n 11 (Okla 2006) It also is why, for the mandamus petition at issue here, the Oklahoma Supreme Court's online docket identifies the district court decision as the opinion under review [4]

Likewise, this Court has characterized mandamus as a form of "interlocutory review" *Pac Union Conf. of Seventh-Day Adventists* v *Marshall*, 434 U S 1305, 1307 (1977) That makes sense, because several states employ mandamus and other writs for interlocutory error correction The California courts, for example, employ writs of mandate for interlocutory review in a wide range of circumstances See *Maine* v *Superior Court*, 438 P 2d 372, 378-379 (Cal 1968) Although such proceedings invariably carry a different caption, they are still part and parcel of the main case

B HCA properly preserved its federal constitutional claim for this Court's review As we explained in the petition (at 14-15), Oklahoma law provides two alternatives for a party seeking to disqualify a trial judge After the aggrieved party requests recusal and appeals to the chief judge, "the alleged error may

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[4] *Shinn* v *Swinton*, No PR-103926 (Okla Oct 27, 2006) http://www oscn net/applications/oscn/GetCaseInformation asp?number=103926&db=Appellate&submitted=true

be raised by a mandamus proceeding *or* in a subsequent appeal." *Pierce*, 39 P 3d at 796. There is no dispute that HCA fully exhausted mandamus review. Thus, because the mandamus proceeding was an earlier stage of the litigation, a GVR order is justified if there is a "reasonable probability" that the Oklahoma Supreme Court would resolve the mandamus petition differently under *Caperton* v. *Lawrence*, 516 U.S. at 167.

Respondents' contention that HCA could have reraised the issue—after it had already been fully preserved through mandamus—has no bearing on *this* Court's jurisdiction. At most, it implicates the procedures that the Oklahoma courts will employ on remand. In any event, Oklahoma appellate courts "may review claims which relate to alleged deprivations of due process of law despite a failure to preserve error." *Patterson* v. *Beall*, 19 P.3d 839, 841 (Okla. 2000). Thus, there is every reason to believe that a GVR order would result in effective review of the *Caperton* issue.[1]

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[1] Respondents rely on *Miller-Dollarhide* for the principle that the denial of mandamus is not necessarily a binding decision on the merits of the underlying dispute. Opp. 17. In that case, the petitioner simultaneously sought mandamus in the Oklahoma Supreme Court and a direct appeal in the Court of Civil Appeals, a fact of which the Oklahoma Supreme Court was "well aware." 174 P.3d at 564. No argument was held, an order was issued without dissent, and the supreme court concluded that its denial did not preclude the petitioner from continuing its direct appeal because the existence of "other adequate remedies at law" was a basis for denying mandamus. *Ibid.* Here, in contrast, there was no parallel proceeding, and the Oklahoma Supreme Court heard argument, issued an order to clear any procedural obstacles (Pet. App. 66a), and then denied mandamus.

C. Contrary to respondents' suggestion, *Caperton* is directly implicated by the decisions below. Respondents downplay their lead counsel's role in chairing Judge Swinton's campaign (Opp. 19-23), but the full story shares the key characteristics of *Caperton*. Mr. Durbin was co-chairman of Judge Swinton's campaign when she first ran for election in 2002. Opp. App. 5a. That race was contentious and required the judge's campaign team to engage in "a lot of last minute fundraising" to neutralize $150,000 in independent expenditures by "a person that was not a candidate in the race" (*id.* at 4a), a stunning amount for a state trial-court judgeship. In anticipation of another contentious election, Judge Swinton appointed the same campaign team for her reelection bid. *Id.* at 5a. After she lined up her allies for a renewed battle, no opponent materialized. *Ibid.* However, the absence of the anticipated opponent by no means neutralizes the fact that Judge Swinton and Mr. Durbin share a relationship of trust, loyalty, and reliance—attributes that are inconsistent with norms of impartial adjudication.

Respondents argue that *Caperton* is not implicated because Judge Swinton was "*deemed* reelected" on June 7, 2006, such that the recusal motion postdated Mr. Durbin's active duties as campaign chairman. Opp. 7, 22. Not so. The complaint was filed in July 2005, so Judge Swinton most certainly presided over the case while her reelection campaign, chaired by Mr. Durbin, was ongoing. Moreover, in *Caperton* itself, the campaign had ended by the time the West Virginia Supreme Court of Appeals resolved the case

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over a dissent. In such circumstances, pursuing identical relief would have been futile.

Otherwise, the newly elected judge would not have been on that court to cast the deciding vote.

Finally, respondents' suggestion that the Oklahoma courts anticipated *Caperton* (Opp. 19-20) is mistaken. To be sure, the Oklahoma courts have recognized the uncontroversial principle that recusal is required where "impartiality might reasonably be questioned." *Pierce*, 39 P.3d at 797. But *Caperton* specifically held that due process is violated "when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by * * * directing the judge's election campaign when the case was pending or imminent." 129 S. Ct. at 2263-2264. That circumstance is mirrored with precision by Mr. Durbin's participation in this case while he chaired Judge Swinton's campaign. Indeed, it is quite possible that reassembling the team that engaged in "a lot of last minute fundraising" for the judge's prior campaign is what scared off any challengers and allowed her to be "deemed reelected." At the absolute minimum, the parallels satisfy *Lawrence*'s requirement that there be a "reasonable probability" that the Oklahoma courts would reconsider their judgment. 516 U.S. at 167.

II. THE COURT SHOULD GRANT CERTIORARI TO ADDRESS THE SAFEGUARDS THAT MUST BE AFFORDED PARTIES BEFORE THE IMPOSITION OF SEVERE SANCTIONS.

In the alternative, plenary review is warranted to provide needed guidance on the procedures that must precede the imposition of severe, pretrial sanctions. In approving the sanction of a directed judgment as to liability, the Oklahoma courts denied

HCA two fundamental due process rights that other courts have guaranteed: the right to "particularized" notice of the alleged misconduct and the possible sanction to be imposed therefor, and the opportunity to mount a factual defense by submitting evidence to the sanctioning court.

Although respondents insist that "due process is flexible" (Opp. 23 (quoting *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972)), both of these issues implicate bright-line rules. Under HCA's view—and that of many courts (see Pet. 18-24)—the Due Process Clause requires particularized notice and the opportunity to submit evidence, regardless of the nature of the conduct underlying the sanctions. These issues are squarely presented in this case.

Contrary to respondents' contention (Opp. 30-31), these procedural safeguards would have made a difference here. If the district court had provided sufficient notice and had accepted HCA's request to present evidence (Pet. App. 101a), it would have learned that HCA made substantial and timely[1] productions of the documents that existed and that many documents that the court and respondents condemned it for failing to produce did not exist. Although *neither* party was perfect in its compliance with discovery rules, the evidence would have shown that any violations by HCA were too minor to justify the draconian sanctions of a directed judgment on

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[1] Respondents' contention that HCA was already delinquent in supplementing discovery by the time of the recusal stay (Opp. 29 n.18) is misleading. When the trial court ordered HCA to supplement its discovery, the court deferred judgment on HCA's motion to strike the discovery order. HCA was under no obligation to complete its production until that motion was resolved.

liability and a jury instruction informing the jury that HCA had committed perjury

Moreover, respondents are flatly wrong in denying the existence of the two mature splits identified in the petition

A The lower courts are divided on whether particularized notice is a prerequisite to the imposition of sanctions Although respondents dispute the division, the Eighth Circuit has specifically noted that the "[c]ourts are split" *Jensen* v *Fed. Land Bank*, 882 F 2d 340, 341 (8th Cir 1989) In arguing otherwise, respondents make two errors *First*, without any reasoned basis, they exclude the numerous cases that have recognized a "particularized notice" requirement in the context of sanctions imposed for reasons other than discovery misconduct Opp 25 *Second*, they invoke cases saying that courts need not warn parties that continued disobedience will result in sanctions, in a misguided effort to suggest that the cases holding that courts must provide particularized notice of the already completed conduct for which sanctions are being contemplated mean other than what they say Opp 26-27

1 Respondents implicitly concede that several federal courts of appeals and state courts of last resort have held that the Due Process Clause requires particularized notice prior to the imposition of sanctions under FED R CIV P 11, FED R APP P 38, FED R BANKR P 9011, 28 U S C § 1927, and a court's inherent powers Compare Opp 24 with Pet 18-19 They contend that these cases don't count, however, and that, in the context of discovery sanctions, we cite only one case requiring particularized notice (*Ohio Furniture Co* v *Mandala*, 488 N E 2d 881 (Ohio 1986) (per curiam)), which they further

contend did not rest on the Due Process Clause They are mistaken in both respects

First, respondents err in contending that discovery sanctions are different because, in that context, "the court has informed the party of its violations and ordered it to comply " Opp 24 Unless the order requires a discrete act—like providing a key to the warehouse—a party that supplements its discovery in response to a court order cannot begin to predict whether its response will be deemed inadequate A discovery order may impose obligations, but it does not provide the kind of particularized notice of the conduct for which sanctions are being contemplated that is essential to preparing a defense any more than the existence of Rule 11 provides the notice necessary to enable a party to defend itself in that context Accordingly, the distinction respondents draw between discovery and all other contexts in which sanctions may be imposed is untenable, and the split to which we pointed (Pet 18-19) is both real and deep

Second, there *is* a split of authority even in the narrow context of discovery sanctions The Utah Supreme Court has required particularized notice in that specific context *See Kilpatrick* v *Bullough Abatement, Inc* , 199 P 3d 957, 965-967 (Utah 2008) Moreover, in reaching the same result, the Ohio Supreme Court relied upon the "due process guarantee of prior notice " *Mandala* 488 N E 2d at 883 Because due process under Ohio law is coextensive with the federal constitutional right (*Direct Plumbing Supply Co* v *City of Dayton*, 38 N E 2d 70, 72 (Ohio 1941)), respondents' effort to slough off *Mandala* as a state-law holding is misguided

2 Respondents cite various cases in which courts have disavowed the need to issue a "warning" before conduct becomes sanctionable Opp 26-27 & n 15 But a warning is not the same as particularized notice The former *precedes* a violation and advises the warned party to alter its behavior The latter *follows* an alleged violation and allows the accused party to prepare its defense The cases cited by respondents demonstrate that courts treat particularized notice and warnings as different things For example, in *Malone* v *U S Postal Service*, 833 F 2d 128, 133 (9th Cir 1987), although the Ninth Circuit found "a warning to be unnecessary," 40 days passed between notice of the alleged violation and the subsequent sanction Likewise, in *FDIC* v *Daily*, 973 F 2d 1525 (10th Cir 1992), 34 days elapsed between the motion for sanctions and imposition of the penalty Thus, these cases do not support respondents' suggestion that the Ninth and Tenth Circuits would countenance affording a party only minutes of advance notice before imposition of sanctions

In sum, the courts are divided on whether a party facing sanctions must be afforded advance notice of the specific allegations with sufficient time to prepare a defense Because this issue arises with frequency and can—as happened here—result in severe, unjustified sanctions, this Court's review is warranted

B Lower courts also are divided on whether a party facing sanctions is constitutionally entitled to submit evidence in its defense through written briefing or an evidentiary hearing Pet 21-24

Respondents again attempt to narrow the scope of the division to the context of *discovery* sanctions (Opp 28), as before, that limitation is artificial[5] As this Court has recognized, "[t]he due process concerns posed by an outright dismissal are plainly greater than those presented by assessing counsel fees against lawyers" *Roadway Express, Inc* v *Piper*, 447 U S 752, 767 n 14 (1980) Decisions requiring *greater* process for *lesser* sanctions most certainly reflect a schism between the lower courts

Moreover, although respondents identify no authorities adopting their proposed distinction between discovery sanctions and other sanctions, this Court has suggested that the *same* rules apply In drawing a comparison between "outright dismissal" and "counsel fees" in *Roadway Express*, this Court applied a case involving discovery sanctions to Rule 11 447 U S at 767 n 14 (citing *Societe Internationale pour Participations Industrielles et Commerciales, S A* v *Rogers* 357 U S 197, 208-212 (1958)) Thus, respondents' suggestion that discovery sanctions and other sanctions should be treated differently is mistaken

Courts have adopted a variety of positions in analyzing the due process requirements for litigation sanctions Some courts have required that the party threatened with such sanctions be afforded a full-on evidentiary hearing, others have mandated at least

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[5] And as before respondents characterize a constitutional decision as one of state law In *Doulamis* v *Alpine Lake Property Owners Ass'n*, 399 S E 2d 689, 693 (W Va 1990), the court required an evidentiary hearing because it correctly recognized that the applicable rules were subject to "constitutional limitations"

the opportunity to provide a written response,[6] and certain courts (like the courts below) have essentially eviscerated the opportunity to respond. This Court's review is warranted to determine which approach is constitutionally correct.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[6] Respondents deny that courts have required that a party threatened with sanctions be given the opportunity to make a written response. Opp. 27-28. To be sure, the cases cited in the petition deem a written response *sufficient* to satisfy due process, rather than *necessary*. But that is only because they recognize that *greater* procedures could obviate the need for a written response. These cases certainly stand for the proposition that the right to respond must be meaningful, which for HCA it unambiguously was not.

Respectfully submitted

CLYDE A. MUCHMORE
Crowe & Dunlevy
20 N. Broadway
Oklahoma City, OK
73102
(405) 235-7734

STEVEN J. RODOLF
LESLIE C. WEEKS
Rodolf & Todd
401 S. Boston Avenue
Tulsa, OK 74103
(918) 295-2100

EVAN M. TAGER
Counsel of Record
DAN HIMMELFARB
BRIAN D. NETTER
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioners

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